No. 2121

10

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. C. WILL JORGENSEN,

Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index. Page

Index. Page

Names and Addresses of Attorneys.

MESSRS. SOLINSKY & WEHE and PAUL C. MORF, Attorneys for Plaintiff in Error, Monadnock Bldg., San Francisco, California.

J. C. CAMPBELL and WALTER SHELTON, Esqrs., Mills Bldg., San Francisco, California.

E. W. HOLLAND and ROWAN HARDIN, Esqrs., Sonora, Tuolumne County, California, Attorneys for Defendant in Error.

[Praecipe Regarding Printing of Record.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

To the Clerk of said Court:

You are hereby requested to omit from the transcript of the record, in printing the same, the following papers:

	Page of Record.
Answer	24
Summons	14
And Stipulation	38

as provided for in the stipulation of counsel, this day filed, and to include in said transcript of the record

to be printed by you the following papers in entirety and which includes everything not included in the above:

Amended Answer.
Assignment of Errors.
Bill of Exceptions.
Bond on Writ of Error.
Complaint.
Clerk's Certificate to Judgment-roll.
Clerk's Certificate to Record on Appeal.
Citation.
Demurrer.
Judgment.
Order Overruling Demurrer.
Order Allowing Defendant to File Second Amended Answer.
Order Allowing Writ of Error.
Petition for Writ of Error.
Second Amended Answer.
Writ of Error.

Respectfully,

F. J. SOLINSKY,
FRANK R. WEHE,
Attorneys for Plaintiff in Error.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. No. 2121. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, a Municipal Corporation of the State of California, Defendant in Error. Notice. Filed Mar. 27, 1912. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

Stipulation [Under Rule 23].

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that in printing the record in said action, the Clerk shall not be required to print the following papers:

Answer.
Summons and
Stipulation.

Dated this 26th day of March, 1912.

F. J. SOLINSKY,
FRANK R. WEHE,
Attorneys for Plaintiff in Error.
J. C. CAMPBELL,
R. HARDIN,
Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. No. 2121. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, a Municipal Corporation of the State of California, Defendant in Error. Stipulation. Filed Mar. 27, 1912. F. D. Monckton, Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Complaint.

Now comes said plaintiff and complaining of said defendant for cause of action alleges:

I.

That at and during all the times hereinafter mentioned one H. H. Will Jorgensen and the plaintiff, J. C. Will Jorgensen, and each of them, were, and still and now are, alien residents of said district and State, and subjects and citizens of the King and Kingdom of Denmark.

II.

That at and during all of the times hereinafter mentioned the said H. H. Will Jorgensen and J. C. Will Jorgensen were, and they still and now are, copartners, doing a general contracting business in the City and County of San Francisco, State of California, under the firm name and style of Jorgensen Bros.

III.

That at and during all of the times hereinafter mentioned the defendant, County of Tuolumne, was,

and still and now is, a municipal corporation of the State of California, and one of the duly created and constituted counties of said state, and acting as such. [1*]

IV.

That the Stanislaus River, hereinafter mentioned, at and during all of said times was, and still and now is, a natural watercourse forming and being the dividing line and boundary between the defendant, County of Tuolumne, and the County of Calaveras, an adjoining county and municipal corporation in and of said State, situated on the north side of said river.

V.

That said H. H. Will Jorgensen and the plaintiff, J. C. Will Jorgensen, as copartners as aforesaid, and within the two years last past, constructed and erected a concrete bridge across said Stanislaus River for the defendant under a written contract made between them as such copartners and the defendant for the construction and erection of such bridge, and that they performed work and labor, and furnished materials, for said defendant, at its special instance and request, in the construction and erection of one of the piers of said bridge located in said river, in addition to the work, labor and material in that regard in said contract contained, stipulated or provided for, of the fair and reasonable value of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States.

*Page-number appearing at foot of page of original certified Record.

VI.

That heretofore, and within one year after the last of said work and labor was performed, and materials were furnished, as aforesaid, the said Jorgensen Bros., said copartners, duly prepared, filed and presented to the Board of Supervisors of said County of Tuolumne, for allowance, all in conformity with and as required by the law and statute of the State of California in and for such case made and provided, their written claim, account or demand for said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, for and on account of said [2] additional work, labor and materials, in the manner and form, and verified, as prescribed by law, which said claim or demand was then and there, and before such presentation and filing, approved by the officer or agent of the defendant who directed such expenditure and was in charge and supervision for said defendant of said work, to wit: N. J. Pickle, County Surveyor of said County, and demanded that the same be allowed and ordered paid; but that the said Board of Supervisors has heretofore, to wit, on the 23d day of February, 1910, rejected said claim and demand, and ever since has refused and now refuses to pay or allow the same.

VII.

That said Jorgensen Bros., said copartners, prior to the commencement of this action in writing and for value duly assigned, transferred and set over all of their said claim and demand, and all moneys payable or owing on account thereof, to this plaintiff, who is now the owner and holder thereof.

VIII.

That no part of said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars has ever been paid, and that the whole thereof is now due, owing and unpaid from said defendant to the plaintiff.

And for a further and separate cause of action, and further complaining of said defendant, the plaintiff alleges:

I, II, III and IV.

The plaintiff hereby and herein expressly refers to and repeats as and for paragraphs I, II, III and IV of this count or cause of action the paragraphs numbered I, II, III and IV in the first count or cause of action of this complaint contained, and all and singular the allegations stated therein, and makes the same part hereof in like manner as if herein expressly set forth. [3]

V.

That on the 8th day of September, 1908, said Jorgensen Bros., said copartners, entered into a written contract with the defendant for the construction of a reinforced concrete bridge for the defendant across the Stanislaus River at Melones, on the road from Sonora, Tuolumne County, to Angels Camp, Calaveras County, whereby they, in consideration of the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars, and the further sum of $4.00 per cubic yard for stone retaining wall, and the further sum of $0.35 per cubic yard for any fill required, to be paid to them by the defendant in the manner and at the times as in said

contract stated, agreed to construct and perform the said work, and deliver the same to the defendant.

VI.

That prior to the execution of said contract and for the purpose, among others, of enabling bidders for the construction of said bridge to estimate and bid thereon and thereby, the defendant caused to be made by the County Surveyor of said County of Tuolumne, and filed with the County Clerk of said County, certain plans and specifications for said bridge, and the said construction thereof, which said plans and specifications were and are by the express terms of said contract made a part thereof; and said contract in express terms further provided and provides that "said construction, erection and work shall be done and completed in a good and workmanlike manner, according to said plans and specifications."

VII.

Said specifications, filed and made and being a part of said contract, as aforesaid, contained and contain the following language, requirements, items, terms, and provisions, among others, to wit: [4]

"SPECIFICATIONS FOR A REINFORCED CONCRETE BRIDGE ACROSS THE STANISLAUS RIVER BETWEEN TUOLUMNE AND CALAVERAS COUNTIES, NEAR MELONES, CALIFORNIA.

LOCATION.

The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.

The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.

GENERAL DESCRIPTION.

The dimensions of this reinforced concrete bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

The approaches at either end of the concrete bridge will consist of an earth and stone fill of lengths as shown on the profile plan and shall be bid on at a price per cubic yard. Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

FOUNDATIONS.

Are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bedrock. It is assumed that the bedrock on each side of the river will be found at a depth shown on plans. Should it be determined that it is necessary to go to a greater depth than this to reach bedrock this work shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation." [5]

"GENERAL PROVISIONS.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not

mentioned in the specifications, must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure.

All materials and workmanship shall be the best of their several kinds, and all be under the supervision and to the satisfaction of the Board of Supervisors of each County and the Engineer in charge of the work."

Said plans, referred to in said specifications and by express terms made a part thereof, and filed and made and being a part of said contract, as aforesaid, definitely and positively fixed, represented, showed, and indicated, and so fixed, represent, show and indicate the location of the bedrock underlying the bed of said river, and the depth from the surface and from the grade of said bridge, fixed in and by said plans and specifications, to bedrock, at a point or place in and near the middle of said river, where the pier of said bridge in said river was to be placed under and according to said contract, plans, and specifications, and was placed, as hereinafter alleged, at not to exceed twenty-seven feet and six inches from the spring line of the arches in said construction, as shown and fixed by said plans and specifications.

And in this connection the plaintiff alleges that said plans warranted and warrant the location of and depth to bedrock [6] in said river at said point or place, as aforesaid, and represented and represent the same as a fact known to or ascertained by the

maker of said plans and to the defendant, and so as to induce the belief, and the said plans did induce the belief in said Jorgensen Bros., said copartners, and they, at and prior to the time of entering into said contract and making their bid therefor, did believe by reason thereof, that said location of bedrock and depth to bedrock in said river, as fixed, shown and represented in and by said plans, as aforesaid, was known to or previously ascertained by the maker of said plans and the defendant, and to be in fact as so fixed, shown and represented therein and thereby, and as hereinabove alleged.

And the plaintiff further alleges in this connection that said plans were the plans upon which said Jorgensen Bros., said copartners, were invited by the defendant to estimate and make their bid for the construction and performance of said work, and that they bid for and offered to construct and perform said work, as aforesaid, for said sums hereinabove alleged, and that they made and entered into said contract, as aforesaid, solely under the belief, and they were thereunto induced solely by the belief, and by the said plans and representations thereon and therein, that bedrock at said point or place in said river was and would be found at the depth and as fixed and shown in and by said plans, and as hereinabove alleged, and that said plans were drawn, and did represent the said location of said bedrock, and depth to bedrock, in said river at said place or point, according to the actual fact and the actual location of said bedrock, and depth to bedrock, at said place or point in said river.

VII.

That in truth and in fact said plans did not and do not show the actual location of the bedrock, or depth to bedrock, in [7] said river, at said place or point where the pier of said bridge in said river, near the middle thereof, was to be placed and erected under and according to said contract, plans, and specifications, as aforesaid, and was placed and erected, as hereinafter alleged; and the actual location of bedrock and depth to bedrock, in said river, at and near said place or point, was not known to or ascertained by the maker of said plans or the defendant, at or prior to the time of the making and filing of said plans, as aforesaid, or at or prior to the time of entering into said contract with said Jorgensen Bros., said copartners; and the bedrock at said point or place in said river was not located or found at the depth or place fixed, shown and represented, as aforesaid, in and by said plans therefor, but was located and was found at a much greater depth in said river at said point or place, to wit: in excess of twenty-five feet and six inches below the place or depth therefor fixed, represented, shown and indicated in and by said plans; and said plans were negligently and carelessly made, drawn and filed, as aforesaid, by said County Surveyor and the defendant, and in entire ignorance on their part, or on the part of either of them, of the actual location of bedrock, or depth to bedrock, in said river at said place or point; and said plans, in ignorance of and contrary to the said actual facts and conditions, and carelessly and negligently, as aforesaid, erroneously, wrongly and inaccurately fixed, represented, showed and indicated, and so fix, represent,

show and indicate the bedrock, and the depth to bedrock, in said river at and near said point or place, at a depth or place therein and thereat, which was and is more than twenty-five feet and six inches above the bedrock, and the actual location of the bedrock, in said river at and near said point and place.

And the plaintiff alleges in this connection that said [8] Jorgensen Bros., said copartners, were at all times prior to, and up to and at, the time of entering into said contract with the defendant, and for a long time after they had commenced the erection and construction of said bridge thereunder, and without any wrong, fault, or neglect on their part, or on the part of either of them, in entire ignorance of the said error, wrong, or inaccuracy of and in said plans, and of the fact that the bedrock, or depth to bedrock, in said river, at and near said point or place, was located or would be found at a much greater, or any greater, depth than as fixed, represented, shown and indicated in and by said plans, or at all other than as so fixed, represented, shown and indicated.

IX.

That said Jorgensen Bros., said copartners, in good faith commenced and thereafter continued under and according to said contract, plans and specifications, the construction and erection of said bridge. That after they had excavated and dug in the bed of said river, at the point or place in said river where the pier of said bridge in said river was to be placed and erected under and in accordance with said contract, plans and specifications, to the depth or place where bedrock is fixed, represented, shown and

indicated, therein and thereat in and by said plans, as aforesaid, for the purpose of constructing the foundation for said pier and of thoroughly imbedding the same in bedrock, as required and prescribed in and by said specifications, the plaintiffs found and ascertained that there was no bedrock, and there was no bedrock, at said point or place in said river where the same was so fixed, represented, shown and indicated therein and thereat in and by said plans; and the foundation for said pier by reason thereof could not then and there be constructed as shown on said plans, and could not then and there be thoroughly, or at all, imbedded [9] in the bedrock, as so shown and required and prescribed by said specifications, and said contract.

X.

That said contract in express terms further provided and provides that the defendant, or its duly appointed agent or superintendent, should at all times during the progress of said work have free access thereto, and be allowed to examine the same, and if said structure, or any part thereof, should not be in accordance with said plans and specifications, it or he should reject the same, and refuse to accept it. That N. J. Pickle, the County Surveyor of said County of Tuolumne, at all times during the progress of said work and herein mentioned, was and acted as the duly appointed agent and superintendent of the defendant, and was in charge and supervision of said work for the defendant as such under said terms and provisions of said contract. That said N. J. Pickle, as such agent and superin-

tendent, required said Jorgensen Bros., said copartners, to continue their said excavations for the foundation for said pier in said river to bedrock, as required and prescribed by said specifications; and that bedrock at said point or place in said river, where said pier in said river and its foundation was to be placed and constructed under and according to said specifications, was not reached or found by said Jorgensen Bros., said copartners, in their said excavations except at a depth in the bed of said river at such point or place in excess of twenty-five feet and six inches below the depth or place fixed, represented, shown and indicated therefor, in and by said plans.

That by reason thereof, and of the facts herein alleged, and by and through the said wrongful, negligent and careless acts of the defendant, its officers and agents, said Jorgensen Bros., said copartners, were compelled to make excavations and dig in [10] the bed of said river to bedrock at said point or place in said river a distance of more than twenty-five feet and six inches in depth in addition to the depth or distance fixed, represented, shown and indicated in and by said plans as the depth or distance to bedrock in said river at said point or place, and put to great loss and expense, and compelled to do their said work at a largely increased cost by reason thereof.

That by reason of the facts herein alleged, and by and through the said wrongful, careless and negligent acts of the defendant, its officers and agents, said Jorgensen Bros., said copartners, were

also compelled to perform and furnish additional work, labor and materials in the construction and erection of said pier in said river at said point or place, and to extend said pier downward for and to the said additional distance of more than twenty-five feet and six inches to bedrock, where the bedrock was actually reached and found at said point or place, as aforesaid, and put to great loss and expense, and compelled to erect said pier at a largely increased cost by reason thereof. That said additional work performed, and labor and material furnished by them as aforesaid, was or were so performed and furnished, as aforesaid at the fair, reasonable and necessary cost and expense to said Jorgensen Bros., said copartners, of more than Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States, whereby, and by reason of the facts herein alleged, the said Jorgensen Bros., said copartners, were injured and damaged in said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

XI.

That plaintiff hereby and herein expressly refers to and repeats as and for paragraph XI hereof the paragraph numbered VI of the first count or cause of action of this complaint, and all [11] and singular the allegations contained therein, and makes the same part hereof, the same as if herein set out at length.

And the plaintiff alleges that said Jorgensen Bros., said copartners, prior to the commencement of this

action duly assigned, transferred and set over to this plaintiff, in writing and for value, all their said claim and demand, and any and all rights by or on account thereof, and their said cause of action, and in and to said damages, and that the plaintiff is now the owner and holder thereof.

XII.

And the plaintiff further alleges that the defendant has heretofore duly accepted said bridge, and is now using and in control of the same as a free public highway, and has voluntarily accepted and now so retains the benefit of the said additional work, labor and materials, performed, done and furnished by said Jorgensen Bros., said copartners, as aforesaid.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars, lawful money of the United States, together with legal interest thereon at the rate of seven (7) per cent per annum from the 23d day of February, 1910, and for costs of suit.

SOLINSKY & WEHE,
Attorneys for Plaintiff. **[12]**

State of California,
City and County of San Francisco,—ss.

J. C. Will Jorgensen, being duly sworn, deposes and says: That he is the plaintiff named in the annexed complaint; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information

or belief, and that as to those matters he believes it to be true.

J. C. WILL JORGENSEN.

Subscribed and sworn to before me this 26th day of March, 1910.

[Seal] D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 29, 1910. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[13]**

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Demurrer.

Now comes the defendant in the above-entitled action and demurs to the alleged first cause of action in plaintiff's complaint filed in said action, and for grounds of demurrer alleges:

I.

That said alleged first cause of action does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said plaintiff has no capacity to sue.

III.

That said alleged first cause of action is uncertain in this, it is therein alleged that said plaintiff and one H. H. Will Jorgensen are copartners, but it does not appear therefrom that they have complied with the provisions of Section 2466 of the Civil Code of the State of California.

IV.

That said alleged first cause of action is ambiguous on the grounds and for the reason stated in paragraph III hereof.

V.

That said alleged first cause of action is unintelligible on the grounds and for the reason stated in paragraph III hereof. [17]

VI.

That said alleged first cause of action is further uncertain in this: It is alleged in paragraph VI of said complaint that "within one year after the last of said labor was performed, and materials were furnished, as aforesaid, the said Jorgensen Brothers, said copartners, duly prepared, filed and presented to the Board of Supervisors of said County of Tuolumne, for allowance, all in conformity with and as required by the law and statute of the State of California, in and for such case made and provided, their written claim, account and demand for said sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars for and on account of said additional work, labor and materials, in the manner and form, and verified, as prescribed by law, but that said Board of Supervisors has heretofore,

to wit, on the 23d day of February, 1910, rejected said claim and demand, and ever since has refused and now refuses to pay or allow the same''; but it does not appear from said allegation in said complaint that said claim and demand presented to the Board of Supervisors of said Tuolumne County was duly, correctly, or at all itemized, giving dates and particular service rendered, character of work done, number of days engaged, character of supplies or materials furnished. Nor does it appear therefrom, whether at the time said alleged claim and demand was presented to the said Board of Supervisors for allowance as aforesaid, that there was sufficient funds or any funds in the treasury of said Tuolumne County legally or otherwise applicable to the payment of said alleged claim and demand, or any part thereof.

VII.

That said alleged first cause of action is ambiguous on the grounds and for the reasons set forth in paragraph VI hereof. [18]

VIII.

That said alleged first cause of action is unintelligible on the grounds and for the reason set forth in paragraph VI hereof.

IX.

That two causes of action are improperly united in said complaint, to wit, an action on an express written contract is improperly joined with an action for damages alleged to have resulted from alleged wrongful, careless and negligent acts of said defendant, its officers and agents.

X.

That said first alleged cause of action in said complaint is ambiguous in this, that it cannot be ascertained therefrom what was the nature of the additional work and labor alleged to have been performed or what materials are alleged to have been furnished as set forth in paragraph V thereof, and said alleged first cause of action is further ambiguous in that it does not appear therefrom that said Jorgensens, as copartners, were to or should for any cause become entitled to any compensation in addition to that fixed and specified in the written contract alleged to have been entered into between defendant and the said Jorgensens.

XI.

That said alleged first cause of action is uncertain for the reason set forth in paragraph X herein.

XII.

That said alleged first cause of action is ambiguous in that it cannot be ascertained therefrom what work and labor said copartners were required to perform or what materials said copartners were required to furnish under the terms of said alleged written contract. **[19]**

XIII.

That said alleged first cause of action is uncertain for the reasons set forth in paragraph XII herein.

XIV.

That said alleged first cause of action is unintelligible for the reasons set forth in paragraph XII herein.

XV.

That said alleged first cause of action is ambiguous in this, that it cannot be ascertained therefrom what portion of said alleged sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars is alleged to be due for additional work and labor, and what portion thereof for materials.

XVI.

That said alleged first cause of action is uncertain for the reasons specified in paragraph XV herein.

And by way of demurrer to the alleged second cause of action in said complaint, defendant specifies as follows:

I.

That said alleged second cause of action does not state facts sufficient to constitute a cause of action against said defendant.

II.

That said plaintiff has no capacity to sue.

III.

That said alleged second cause of action is uncertain in this, it is therein alleged that said plaintiff and one H. H. Will Jorgensen are copartners, but it does not appear therefrom that they have complied with the provisions of Section 2466 of the Civil Code of the State of California.

IV.

That said alleged second cause of action is ambiguous on [20] the grounds and for the reason stated in paragraph III hereof.

V.

That said alleged second cause of action is unin-

telligible on the grounds and for the reason stated in paragraph III hereof.

VI.

That said alleged second cause of action is ambiguous in this, that it cannot be ascertained therefrom how, or in what manner, "said plans warranted and warrant the location of and depth to bedrock in said river at said point or place, as aforesaid," as alleged in paragraph VII of said alleged second cause of action.

VII.

That said alleged second cause of action is unintelligible on the grounds and for the reason stated in paragraph VI hereof.

VIII.

That said alleged second cause of action is uncertain on the grounds and for the reason stated in paragraph VI hereof.

IX.

That said alleged second cause of action is ambiguous in that it cannot be ascertained therefrom what was the exact sum in which said Jorgensen Brothers are alleged to have been injured and damaged by reason of the alleged facts therein set forth.

X.

That said alleged second cause of action is uncertain on the grounds and for the reason set forth in paragraph IX hereof.

XI.

That said alleged second cause of action is ambiguous in that it cannot be ascertained therefrom what was the nature of the alleged additional work and

labor performed and materials furnished. What portion of said alleged sum of Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars is **[21]** alleged to be due for said alleged additional work and labor performed and what portion thereof for said alleged additional material.

XII.

That said alleged second cause of action is unintelligible on the grounds and for the reason set forth in paragraph XI hereof.

XIII.

That said alleged second cause of action is uncertain on the grounds and for the reason set forth in paragraph XI hereof.

Wherefore the defendant prays that it may be dismissed with judgment for costs incurred.

E. W. HOLLAND,
CAMPBELL, METSON, DREW, OATMAN & MACKENZIE,
Attorneys for Defendant.

Due service of within Demurrer be receipt of a copy thereof is hereby admitted this 2d day of May, 1910.

SOLINSKY & WEHE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. **[22]**

At a stated term, to wit, the July term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Thursday, the 15th day of September, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein heretofore heard and submitted being now fully considered and the Court having rendered its oral opinion thereon, it was ordered, in accordance therewith, that said demurrer be and the same is hereby overruled. **[23]**

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Amended Answer.

Now comes the defendant in the above-entitled action by its attorneys, and by leave of the Court first had and obtained, files this its amended answer, and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of the said complaint.

As to the allegations contained in paragraph II of said complaint this defendant has no information or belief upon the subject sufficient to enable him to answer the allegations contained in said paragraph II, and placing its denial upon that grounds, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were, at the time of the commencement of this action, or now are, copartners or engaged in business as such.

II.

Admits the allegations contained in paragraph III and IV of the said complaint.

III.

Admits that this defendant and H. H. Will Jorgensen and J. C. Will Jorgensen within the two years prior to the commencement [39] of this action constructed and erected a concrete bridge across the Stanislaus River under a written contract made between H. H. Will Jorgensen and J. C. Will Jorgensen, but defendant denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, either as copartners, or otherwise, performed any work and labor, or work or labor, and furnished materials, or fur-

nished materials for this defendant at its special instance and request, or its special instance or request in the construction and erection, or the construction or erection of one of the piers of the said bridge located in said river in addition to the work, labor and materials provided for in said contract, and denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, or either of them, either as co-partners, or otherwise, ever performed any services or did any work or labor in addition to the work, labor and materials, or labor or materials, provided for in said contract, of the reasonable value of Seven Thousand Nine Hundred Fifty-six Dollars ($7,956), or of any value whatever.

Admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars ($7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the Statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was performed, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim that the same was approved by the officer or agent of [40] the defendant, who di-

rected such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

IV.

Admits that the said plaintiff demanded that the said alleged claim be allowed and ordered paid and that the Board of Supervisors of Tuolumne County rejected said alleged claim and demand, as alleged in paragraph VI of said complaint, and admits that the said Board of Supervisors of the said County of Tuolumne has refused and still refuses to pay or allow the said alleged claim.

V.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground, denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value received duly, or otherwise, assigned, transferred and set over, or assigned or transferred or set over, all of their said alleged claim and demand, or claim or demand, and all moneys, or all moneys, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

VI.

Admits that no part of said alleged claim has ever been paid by the said defendant, but denies that the whole thereof, or any part thereof, or any sum whatever, is due, owing or unpaid from said defendant to the said plaintiff. [41]

Further answering said complaint, and for a further defense herein, to plaintiff's first cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued, more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular, that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defendant alleges that plaintiff's cause of action herein is barred by the provisions of Section 4075 of the Political Code of the State of California.

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of $7,956.63, was not properly or legally payable by the said County of Tuolumne, through its

Board of Supervisors, for the reason that there was not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess [42] of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

In answer to plaintiff's second cause of action defendant admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of said second cause of action in said complaint.

As to the allegations contained in paragraph II in said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II of said second cause of action, and placing its denial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were at the time of the commencement of this action, or now are, copartners, or engaged in business as such.

II.

Admits the allegations contained in paragraph III and IV of said second cause of action in said complaint.

III.

This defendant admits the allegations contained in paragraph V and VI of the second alleged cause of action set forth in said complaint, and admits the allegations contained in paragraph VII thereof down to and including line 16 on page 6 of said second cause of action alleged in said complaint.

Denies that the plans and specifications filed and made a part of said contract as aforesaid, definitely or positively fixed, represented, or did positively fix or represent, the location of the bedrock underlying the bed of said river, and denies that said plans aforesaid positively or definitely fixed **[43]** a distance not to exceed 25 feet 6 inches from the spring line of the arches in said construction of said bridge, and alleges that plaintiff well knew, and said Jorgensen Bros., said copartners, well knew, before entering into said contract, that said plans hereinbefore mentioned only attempted to approximate the bedrock underlying said river, for the reason that the actual location of said bedrock could not be determined without excavation being made through and under said river, and said plaintiff and said Jorgensen Bros., copartners, well knew that such excavation had not been made, and they well knew that the specifications filed with said plans provided, "should it be determined that it is necessary to go to a greater depth than shown in said plans to reach bedrock, said work shall be done by the contractors without additional expense to either County," which provision would not have been in said specification had it been intended or provided that said plans

should definitely or positively fix the location of bedrock underlying said river as alleged in plaintiff's complaint.

And defendant denies that said plans when construed with said specifications warranted, or did warrant, the location of the depth to bedrock in said river at said point, or place as aforesaid, or represented the same as a fact known to or ascertained by the maker of said plans, or to defendant, or so as to induce the belief, and denies that said plans did induce the belief in said Jorgensen Bros., said copartners, and denies that prior to the time of entering into said contract, and making their bid therefor, did believe by reason of said plans and specifications that said location of bedrock, or depth to bedrock in said river shown in said plans as aforesaid was known to, or previously ascertained by the maker of said plans and defendant, and denies that they did believe that bedrock underlying said **[44]** river to be in fact as shown by said plans, and alleges that said specifications accompanying and made a part of said plans did request that contractors view the proposed work on the grounds, and judge all its nature and character before presenting bids, and denies that they made and entered into the contract as aforesaid under the belief, or that they were thereunto induced by the belief, or by the said plans and representation thereon and therein, that bedrock at said point or place in said river was and would be found at the depth as shown in and by said plans, and denies that said plans did represent the said location of said bedrock and the depth of bedrock in said

river at said place or point according to the actual fact, or the actual location of said bedrock, or depth to bedrock at said place or point in said river, but, on the contrary, said specifications which were made a part of said plans and profile did specifically provide, "it is *assumed* that the bedrock on each side of the river will be found at a depth shown on said plans," and nowhere in said specifications does it appear that said plans did positively or definitely fix the location of the bedrock underlying said river.

IV.

Admits that the bedrock in the said river was found at a greater depth than indicated in and by said plans and specifications, and alleges that under the terms of said contract that the extra work rendered necessary by reason of the bedrock being at a greater depth at the point indicated in and by the said plans was to be performed at the expense of the said Jorgensen Bros., contractors for the construction of said bridge, at their expense and free from any expense whatever to this county; deny that said plans were negligently and carelessly made, or **[45]** negligently or carelessly made, drawn and filed by the County Surveyor of said County of Tuolumne or this defendant, or either of them, and deny that by reason of any negligence or carelessness of the said County Surveyor and this defendant that the said plaintiff was deceived or kept in ignorance of the actual location and depth of the said bedrock or the depth of the bedrock in said river at the point where said bridge was constructed, and as to the allegation in said complaint that the bedrock was and is more

than 25 feet 6 inches from the point or place indicated on the said plans, defendant had no information or belief sufficient to enable it to answer said allegation, and placing its denial on that ground, denies that the bedrock was and is, or was or is, 25 feet 6 inches, or any distance whatever below the point indicated in and by the said plans and specifications.

Denies that the said Jorgensen Brothers were at the time they entered into said contract with this defendant, or at any time after they had commenced any of the construction of the said bridge under said contract, in entire ignorance in the manner in which said plans and specifications were drawn or in ignorance of the fact that the bedrock or depth of bedrock in said river at or near or at or near the point and place indicated by said plans and specifications would be found at a greater, or any greater, depth than fixed and shown and indicated in and by the said plans.

V.

Further answering, defendant alleges that at the time of entering into the contract for the construction of said bridge and at the time of the commencement of the work of constructing said bridge under said contract, that the said Jorgensen Brothers were in possession of the same knowledge and facts as to the depth of the bedrock at the point where said bridge was constructed [46] as this defendant, and that the said Jorgensen Brothers entered into said contract with said defendant for the construction of said bridge, and entered into the work of constructing said bridge with the full knowledge that

the physical conditions existing at the point of the Stanislaus River where said bridge was constructed, rendered it impossible to determine the depth from the bed of said river to the bedrock without doing the actual work of excavating to said bedrock.

Denies that the foundation of the pier, or any pier, of the said bridge could not be constructed as shown on the said plans and specifications, and denies that the pier of said bridge could not have been thoroughly embedded in the bedrock as shown as required and prescribed by said plans and specifications contained in the contract for the construction of said bridge.

VI.

Admits that N. J. Pickle, County Surveyor of the said County of Tuolumne, at all times during the progress of the work of construction of the said bridge was the superintendent of the defendant and in charge of the said work for the defendant, and was authorized and directed by the said defendant to see that the said bridge was constructed in accordance with the said plans and specifications and in accordance with said contract; but denies that said Jorgensen Brothers were required by said N. J. Pickle or by this defendant to do any work not specified and required by the terms of said contract.

Denies that by reason of or by and through, or by or through, any wrongful, negligent and careless, or wrongful, negligent or careless, act of the defendant, or its officers or agent, the said Jorgensen Brothers were compelled to make any excavations or dig in the bed of the said river for bedrock at any point or

place in said river, a distance of more than 25 feet and 6 [47] inches in depth, or any depth, and allege that any excavation work done by the said Jorgensen Brothers was in strict accordance with the requirements of the said contract and not by reason of any wrongful or careless or negligent act of this defendant, or any of its officers or agents.

Denies that the said Jorgensen Brothers were put to great loss and expense or great loss or expense, or any loss or expense, and compelled to do their said work, or compelled to do their said work at a largely increased cost, or at any increased cost by reason of any wrongful, negligent or careless act of the said defendant or any of its officers or agents.

Denies that by and through, or by or through, any wrongful, careless or negligent act of this defendant, its officers or agents, said Jorgensen Brothers were compelled to perform and furnish, or perform or furnish, any additional work, labor and materials, or work or labor or materials in the construction and erection of the pier in said river or any pier in said river in connection with the construction of said bridge and to extend, or to extend said pier downward for and to, or for or to, the additional distance of more than 25 feet 6 inches to bedrock, or any depth to bedrock whatever, and denies that by reason of any wrongful or negligent act of said defendant or its officers or agents, the said Jorgensen Brothers were put to great loss and expense, or any loss or expense, or compelled to erect said pier or any pier, at a largely increased cost.

Denies that said Jorgensen Brothers performed

any additional work or labor or furnished any materials by reason of any wrongful or negligent or careless act of the said defendant, or its agents, or its officers, and denies that by reason of any wrongful or negligent act of the said defendant, its officers or agents, the said Jorgensen Brothers were required to incur [48] any cost or expense for work or labor or materials other than what was required by the terms and conditions of said contract, and deny that by reason of any wrongful, careless or negligent act of the said defendant or its officers or agents, or by reason of any defect in the said plans and specifications, the said Jorgensen Brothers were injured and damaged in the sum of Seven Thousand Nine Hundred Fifty-six Dollars, or any sum whatever, or at all.

VII.

In answer to paragraph XI of plaintiff's second cause of action, defendant admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars ($7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the Statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was per-

formed, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim that the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner. [49]

VIII.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value, received duly, or otherwise, assigned, transferred and set over, or assigned or transferred or set over, all of their said alleged claim and demand, or claim or demand, and all moneys, or all moneys, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

Further answering said complaint and for a further defense herein, to plaintiff's second cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were

entirely rendered and furnished, and all the items of said alleged claim accrued more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular, that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defendant alleges that plaintiff's cause of action herein is barred by the provisions of Section 4075 of the Political Code of the State of California. [50]

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of $7,956.63, was not properly or legally payable by the said County of Tuolumne, through its Board of Supervisors, for the reason that there was not sufficient moneys in the County Treasury of Tuolumne County, at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials, specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

WHEREFORE, defendant prays that the said plaintiff take nothing by this action and that this defendant have a judgment against the said plaintiff and for its costs herein.

ROWAN HARDIN,
District Attorney of Tuolumne Co., Attorney for Defendant.

E. W. HOLLAND,
Attorney for Defendant.

J. C. CAMPBELL,
Attorney for Defendant. [51]

State of California,
County of Tuolumne,—ss.

T. F. McGovern, being duly sworn, deposes and says: That he is Chairman of the Board of Supervisors of the County of Tuolumne, State of California, and as such Chairman of the Board of Supervisors is an officer of said County of Tuolumne, State of California, the defendant named in the above-entitled action; that he has read the foregoing amended answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters he believes it to be true; that affiant makes this verification for and in behalf of the County of Tuolumne, defendant named in said above-entitled action.

T. F. McGOVERN.

Subscribed and sworn to before me this 8th day of March.

[Seal] ROWAN HARDIN,
Notary Public in and for the County of Tuolumne, State of California.

Due service of a copy hereof admitted March 21, 1911.

F. J. SOLINSKY,
FRANK R. WEHE,
Attys. for Plaintiff.

[Endorsed]: Filed Mar. 21, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [52]

At a stated term, to wit, the July term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom, in the City and County of San Francisco, on Wednesday, the 25th day of October, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Order Allowing Defendant to File Second Amended Answer.

* * * * * * * * *

Upon motion of Mr. Campbell, it was ordered that the defendant may file its second amended answer herein. [53]

* * * * * * * * *

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Second Amended Answer.

Now comes the defendant in the above-entitled action by its attorneys, and by leave of the Court first had and obtained, files this its Second Amended Answer, and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of the said complaint.

As to the allegations contained in paragraph II of said complaint this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II, and placing its denial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were, at the time of the commencement of this action, or now are, copartners or engaged in business as such.

II.

Admits the allegations contained in paragraphs III and IV of the said complaint.

III.

Admits that this defendant and H. H. Will Jorgensen and [54] J. C. Will Jorgensen within the two years prior to the commencement of this action constructed and erected a concrete bridge across the Stanislaus River under a written contract made between H. H. Will Jorgensen and J. C. Will Jorgensen, but defendant denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen, or either of them, either as copartners, or otherwise, performed any work and labor, or work or labor, and furnished materials, or furnished materials for this defendant at its special instance and request, or its special instance or request, in the construction and erection, or the construction or erection of one of the piers of the said bridge located in said river in addition to the work, labor and materials provided for in said contract, and denies that the said H. H. Will Jorgensen or J. C. Will Jorgensen, or either of them, either as copartners or otherwise, ever performed or did any work or labor in addition to the work, labor and materials, or labor or materials, provided for in said contract, of the reasonable value of Seven Thousand Nine Hundred Fifty-six Dollars ($7,956), or of any value whatever.

Admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars ($7,956.63), but denies that said alleged bill or claim was prepared

or filed in the manner required by the law and the statutes of the State of California in and for such cases made and provided, and denies that said alleged claim was duly or properly itemized as prescribed by law, or at all, and denies that said claim was presented within one year after the last of said alleged work and labor or work or labor was performed, or after the last of said [55] alleged materials was furnished, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and filing of said alleged claim the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant, of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

IV.

Admits that the said plaintiff demanded that the said alleged claim be allowed and ordered paid, and that the Board of Supervisors of Tuolumne County rejected said alleged claim and demand, as alleged in paragraph VI of said complaint, and admits that the said Board of Supervisors of the said County of Tuolumne has refused and still refuses to pay or allow the said alleged claim.

V.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial

upon that ground denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value received, duly, or otherwise, assigned, transferred and set over, or assigned, or transferred or set over, all of their said alleged claim and demand, or claim or demand, or any part thereof, and all moneys, or all moneys, or any part thereof, payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand. [56]

VI.

Admits that no part of said alleged claim has ever been paid by the said defendant, but denies that the whole thereof, or any part thereof, or any sum whatever, is due, owing or unpaid from said defendant to the said plaintiff.

FURTHER ANSWERING said complaint and for a further defense herein, to plaintiff's first cause of action, this defendant alleges:

I.

That the alleged work and labor performed and materials furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of the County of Tuolumne, and alleges in particular that the last item of said alleged claim accrued more than one year prior to the date said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County, and this defend-

ant alleges that plaintiff's cause of action herein is barred by the provisions of section 4075 of the Political Code of the State of California.

II.

Further answering said complaint, and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished the amount of said alleged claim, to wit, the sum of $7,956.63, was not properly or legally payable by the said County of Tuolumne, through its Board of Supervisors, for the reason *that were* not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and [57] the furnishing of said alleged extra materials specified in said alleged claim available for or legally applicable to the payment of the said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne, for the year during which said alleged extra work and labor was performed and materials furnished.

In ANSWER to plaintiff's SECOND CAUSE OF ACTION, defendant admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of said second cause of action in said complaint.

As to the allegations contained in paragraph II in said complaint, this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations contained in said paragraph II of said second cause of action, and placing its de-

nial upon that ground, denies that the said H. H. Will Jorgensen and J. C. Will Jorgensen mentioned in said paragraph were at the time of the commencement of this action or now are copartners, or engaged in business as such.

III.

This defendant admits the allegations contained in paragraphs V and VI of the second alleged cause of action set forth in said complaint, and admits the allegations contained in paragraph VII thereof down to and including line 16 on page 6 of said second cause of action alleged in said complaint.

Denies that the plans and specifications or either of them, filed and made a part of said contract as aforesaid, fixed, represented, showed and indicated, or fixed, or represented or showed or indicated, or so fix, represent, show and indicate, or fix or represent or show or indicate, the location of the bedrock underlying the bed of said river and denies [58] that said plans aforesaid, or either of them, fixed a distance not to exceed 27 feet 6 inches from the spring line of the arches in said construction of said bridge, or any other distance from said bedrock to said spring line as an ascertained fact, and alleges that plaintiff well knew and said Jorgensen Brothers, said copartners, well knew before entering into said contract, that said plans hereinbefore mentioned only attempted to approximate the bedrock underlying said river, for the reason that the actual location of said bedrock could not be determined without excavation being made through and under said river, and said plaintiff and said Jorgensen Brothers, co-

partners, well knew that such excavation had not been made, and they and each of them well knew that the specifications filed with said plans provided: "should it be determined that it is necessary to go to a greater depth than shown in said plans to reach bedrock, said work should be done by the contractors without additional expense to either county," which provision would not have been in said specifications had it been intended or provided that said plans should definitely or positively or at all fix, as an ascertained fact, the location of bedrock underlying said river as alleged in plaintiff's complaint.

And defendant denies that said plans or any of them warranted, or did warrant, the location of, and the depth to or the location of or the depth to bedrock in said river at said point, or place as aforesaid, or represented the same as a fact known to or ascertained by the maker of said plans, or to defendant, or so as to induce the belief, and denies that said plans or either of them did induce the belief in said Jorgensen Brothers, said copartners, and denies that prior to the time of entering into said contract or making the bid therefor they or either of **[59]** them did believe by reason of said plans and specifications, or either of them, that said location of bedrock, or depth to bedrock in said river shown in said plans as aforesaid, was known to, or previously ascertained by, the maker of said plans, or the defendant, and denies that they or either of them did believe that the bedrock underlying said river was in fact as shown by said plans, and alleges that said specifications accompanying and made a part of said plans did request

that contractors view the proposed work on the ground and judge of its nature and character before presenting bids, and denies that they made and entered into the contract as aforesaid under the belief, or that they were thereunto induced by the belief, or by the said plans and representations thereon or therein, that bedrock at said point or place in said river was, and would be found at, the depth as shown in and by said plans, and denies that said plans did represent the said location of said bedrock or the depth to bedrock in said river at said place or point according to the actual fact, or the actual location of said bedrock, or depth to bedrock at said place or point in said river, but, on the contrary, defendant alleges that said specifications which were made a part of said plans and profile and with which said plans and profile were to be construed, did specifically provide as follows: "It is *assumed* that the bedrock on each side of the river will be found at a depth shown on said plans," and nowhere does it appear that said plans or specifications did fix the location of the bedrock underlying said river as an ascertained fact.

IV.

Admits that the bedrock in the said river was found at a greater depth than indicated in and by said plans and specifications, and alleges that under the terms of said contract that **[60]** the extra work rendered necessary by reason of the bedrock being at a greater depth at the point indicated in and by the said plans, was to be performed at the expense of the said Jorgensen Brothers, contractors for the

construction of said bridge, at their expense and free from any expense whatever to said County of Tuolumne; denies that said plans were negligently and carelessly, or negligently or carelessly, made or drawn or filed by the County Surveyor or this defendant, or that the said Jorgensen Brothers, said copartners, were deceived or kept in ignorance of the actual location or depth of the said bedrock or the depth to the bedrock in said river at the point where said bridge was constructed; and as to the allegation in said complaint that the bedrock was and is more than 25 feet 6 inches from the point or place indicated on the said plans, defendant has no information or belief sufficient to enable it to answer said allegations, and placing its denial on that ground, denies that the bedrock was and is, or was or is, 25 feet 6 inches, or any distance whatever, below the point indicated in and by the said plans and specifications.

Denies that the said Jorgensen Brothers were at the time they entered into said contract with this defendant, or at any time after they commenced any of the construction of the said bridge under said contract, in entire or any ignorance in the manner in which said plans and specifications were drawn, or in ignorance of the fact that the bedrock or depth to bedrock in said river at or near the point and place indicated by said plans and specifications would be found at a greater or any greater depth than fixed and shown and indicated in and by the said plans.

V.

Further answering, defendant alleges that at the time of [61] entering into the contract for the

construction of said bridge and at the time of the commencement of the work of constructing said bridge under said contract, the said Jorgensen Brothers were in possession of the same knowledge and facts as to the depth to the bedrock at the point where said bridge was constructed as this defendant, and that the said Jorgensen Brothers entered into said contract with said defendant for the construction of said bridge and entered into the work of constructing said bridge with the full knowledge that the physical conditions existing at the point on the Stanislaus River where said bridge was constructed rendered it impossible to determine the depth from the bed of said river to the bedrock without doing the actual work of excavating to said bedrock.

Denies that the foundation of the pier, or any pier, of the said bridge could not be constructed as shown on the said plans and specifications, and denies that the pier of said bridge could not have been thoroughly embedded in the bedrock as shown, required and prescribed by said plans and specifications contained in the contract for the construction of said bridge.

VI.

Admits that N. J. Pickle, County Surveyor of the said County of Tuolumne, at all times during the progress of the work of construction of the said bridge was the superintendent of the defendant, and in charge of the said work for the defendant, and was authorized and directed by the said defendant to see that the said bridge was constructed in accordance with the said plans and specifications, and in ac-

cordance with the said contract; but denies that said Jorgensen Brothers were required by said N. J. Pickle or by this defendant to do any work not specified and required by the terms of said contract. **[62]**

Denies that by reason of, or by and through, or by or through any wrongful, negligent and careless, or wrongful, or negligent, or careless, act of the defendant, or its officers or agent, the said Jorgensen Brothers were compelled to make any excavations or dig in the bed of the said river for bedrock at any point or place in said river, a distance of more than 25 feet and 6 inches in depth, or any depth, and alleges that any excavation work done by the said Jorgensen Brothers was in strict accordance with the requirements of the said contract and not by reason of any wrongful or careless or negligent act of this defendant, or any of its officers or agents.

Denies that the said Jorgensen Brothers were put to great loss and expense or great loss or expense, or any loss or expense, and compelled to do their said work, or compelled to do their said work, at a largely increased expense or cost, or at any increased cost, by reason of any wrongful or negligent or careless act of the said defendant or any of its officers or agents.

Denies that by and through, or by or through, any wrongful, or careless or negligent act of this defendant, its officers or agents, said Jorgensen Brothers were compelled to perform and furnish, or perform or furnish, any additional work, labor and materials, or work or labor or materials, in the construction or erection of the pier in said river or any pier in said

river in connection with the construction of said bridge, and to extend, or to extend, said pier downward for and to, or for or to, the additional distance of more than 25 feet 6 inches to bedrock, or any depth to bedrock whatever, and denies that by reason of any wrongful or negligent act of said defendant or its officers or agents, the said Jorgensen Brothers were put to great loss and expense, or any loss or expense, or compelled to erect said **[63]** pier or any pier, at a largely or at all increased cost.

Denies that said Jorgensen Brothers performed any additional work or labor, or furnished any materials, by reason of any wrongful or negligent or careless act of the said defendant, or its agents or officers, and denies that by reason of any wrongful or negligent act of the said defendant, its officers or agents, the said Jorgensen Brothers were required to incur or did incur any cost or expense for work, or labor, or materials, and denies that by reason of any wrongful or careless or negligent act of the said defendant, or its officers or agents, or by reason of any defect in the said plans and specifications, or either of them, the said Jorgensen Brothers were injured and damaged or injured or damaged in the sum of Seven Thousand Nine Hundred Fifty-six Dollars ($7,956), or any sum whatever, or at all.

VII.

In answer to paragraph XI of plaintiff's second cause of action, defendant admits that prior to the commencement of this action the said J. C. Will Jorgensen and H. H. Will Jorgensen filed with the Clerk of the Board of Supervisors of the said County of

Tuolumne an alleged bill or claim for the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars ($7,956.63), but denies that said alleged bill or claim was prepared or filed in the manner required by the law and the statutes of the State of California, in and for such cases made and provided; and denies that said alleged claim was duly or properly itemized as prescribed by law, and denies that said claim was presented within one year after the last of said alleged work and labor, or work or labor, was performed, or after the last of said materials was furnished, as alleged in paragraph VI of said complaint, and denies that prior to the presentation and **[64]** filing of said alleged claim the same was approved by the officer or agent of the defendant who directed such expenditure or was in charge and supervision, or in charge or supervision, for the said defendant, of said work, and denies that the said alleged claim for said alleged services was, prior to the filing thereof, or at any time, or at all, approved by any officer or agent of this defendant, or approved by any person or in any manner.

VIII.

That as to the allegations contained in paragraph VII of the said complaint, this defendant alleges that it has no information or belief upon the subject set forth in said paragraph VII, and placing its denial upon that ground, denies that the said Jorgensen Brothers, as copartners, or otherwise, prior to the commencement of this action, in writing or otherwise, and for value, or for value, received, duly or otherwise, assigned, transferred and set over, or as-

signed, or transferred or set over, all or any part of their said alleged claim and demand, or claim or demand, and all or any moneys payable or owing on account thereof to the plaintiff in said action, and denies that the plaintiff is the owner and holder of the said claim or demand.

FURTHER ANSWERING said complaint and for a FURTHER DEFENSE herein to plaintiff's second cause of action, this defendant alleges:

I.

That the alleged work and labor performed and mater*aisl* furnished as alleged in said complaint were entirely rendered and furnished, and all the items of said alleged claim accrued, more than one year prior to the presentment and filing of the claim therefor with the Clerk of the Board of Supervisors of **[65]** the County of Tuolumne, and alleges in particular that the last item of said alleged claim accrued more than one year prior to the date when said claim was presented and filed with the Clerk of the Board of Supervisors of Tuolumne County; and this defendant alleges that plaintiff's alleged cause of action herein is barred by the provisions of section 4075 of the Political Code of the State of California.

II.

Further answering said complaint and for a further defense herein, this defendant alleges that at the time of the presentation of the said alleged claim for said alleged extra work performed and materials furnished, the amount of said alleged claim, to wit, the sum of Seven Thousand Nine Hundred Fifty-six and 63/100 Dollars ($7,956.63), was not properly or legally payable by the said County of

Tuolumne through its Board of Supervisors, for the reason that there were not sufficient moneys in the County Treasury of Tuolumne County at the time of the performance of the said alleged extra work and labor and the furnishing of said alleged extra materials specified in said alleged claim, available for or legally applicable to the payment of the said alleged claim, or any part thereof, and that the amount of said alleged claim, and the whole thereof, was in excess of the revenue provided for such purposes by the said County of Tuolumne for the year during which said alleged extra work and labor was performed and materials furnished.

WHEREFORE, defendant prays that the said plaintiff take nothing by this action, and for its costs herein.

ROWAN HARDIN,
E. W. HOLLAND and
J. C. CAMPBELL,
Attorneys for Defendant. **[66]**

State of California,
City and County of San Francisco,—ss.

T. F. McGovern, being duly sworn, deposes and says: That he is the Chairman of the Board of Supervisors of the County of Tuolumne, State of California, and as such Chairman of said Board of Supervisors is an officer of said County of Tuolumne, the defendant named in the within entitled action; that he has read the foregoing Second Amended Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be

true; that affiant makes this verification for and on behalf of said County of Tuolumne, the defendant named in the within-entitled action.

T. F. McGOVERN.

Subscribed and sworn to before me this 20th day of October, 1911.

[Seal] FLORA HALL,

Notary Public, in and for the City and County of San Francisco, State of California.

Due service of a copy hereof admitted Oct. 25, 1911.

SOLINSKY & WEHE,

For Plaintiff.

[Endorsed]: Filed Oct. 25th, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[67]**

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 25th day of October, 1911, being a day in the July, 1911, Term of said Circuit Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, F. R. Wehe, and Paul

C. Morf, Esqrs., appearing as attorneys for plaintiff, and J. C. Campbell, Rowan Hardin and Walter Shelton, Esqrs., appearing as attorneys for defendant, and the trial having been proceeded with on the 26th and 27th days of October, all in said year and term, and evidence oral and documentary having been introduced and the attorneys for the defendant having at the close of plaintiff's case moved the Court for a judgment of nonsuit and the Court, after hearing arguments of the respective parties upon said motion, and after full consideration thereof having ordered that said motion be granted and that a judgment of nonsuit be entered herein, with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and is hereby entered against said plaintiff herein; that defendant go hereof without day; and that defendant recover from plaintiff [68] its costs in this behalf expended, taxed at $311.65.

Judgment entered October 27, 1911.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

A True Copy. ATTEST:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed October 27, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [69]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 15,051.

J. C. WILL JORGENSEN

vs.

COUNTY OF TUOLUMNE, etc.

Clerk's Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 27th day of October, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed October 27, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Hon. W. C. VAN FLEET, Judge.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial on the law side of the court on Wednesday, the 25th day of October, 1911, before Hon. W. C. Van Fleet, District Judge, presiding, and a jury was duly impanelled, selected and sworn, whereupon the following proceedings were had:

Plaintiff, by one of his attorneys, Frank R. Wehe, opened the cause and stated generally what he expected to prove.

Whereupon plaintiff offered in evidence a written contract made and executed on the 8th day of September, 1908, between the County of Tuolumne and J. C. Will Jorgensen and H. H. Will Jorgensen, and asked that the same be marked "Plaintiff's Exhibit 1." Defendant objected to the introduction of said contract in evidence upon the ground that said instrument was inadmissible, for the reason that said contract had never been filed for record in the County

Recorder's Office, the same being a building contract involving more than one thousand dollars. Pursuant to stipulation of counsel for both plaintiff and defendant, [71] the Court reserved its ruling upon said objection until the final argument, and admitted said contract in evidence subject to said objection. The said contract admitted in evidence was marked "Plaintiff's Exhibit 1," and is in words and figures following, to wit:

[Plaintiff's Exhibit No. 1.]

THIS CONTRACT AND AGREEMENT, made and entered into this 8th day of September, A. D. 1908, by and between the County of Tuolumne, a Municipal Corporation, in the State of California, acting in its representative capacity, by and through its Board of Supervisors who were duly authorized, the party of the first part, and H. H. Will Jorgensen and J. C. Will Jorgensen, partners doing business under the firm name and style of Jorgensen Brothers, of the City and County of San Francisco, the parties of the second part,

WITNESS that whereas, said Board of Supervisors, by Order and Resolution, regularly made and legally advertised, has ordered the Construction of a Bridge crossing the Stanislaus River at Melones on the road from Sonora to Angels Camp at a point known as Robinsons Ferry, and the bids for the same be received on the 24th day of August, A. D. 1908.

AND, WHEREAS, the parties of the second part, in response to said order, Resolution and Notice, did present their bid and proposal for said work, and said Board of Supervisors being fully advised of the de-

cision in the premises, did, by Order and Resolution regularly made, accept said bid and proposal of said parties of the second part, and did let and award to them the Contract for said work, and provide for the execution and delivery of this agreement.

NOW, THEREFORE, in consideration of the premises, [72] and a further consideration of the sum of $16,775.00, to be paid by the party of the first part, as hereinafter expressed and provided, the party of the second part, for themselves, their successors and assigns, promise and agree, with said party of the first part, that they will honestly and faithfully perform the work herein referred to within the time hereinafter expressed, and upon payment of said sum and the further sum of $4.00 per cubic yard for stone retaining wall and the further sum of $.35 per cubic yard for any fill required, will deliver the same to the party of the first part or its authorized agents.

NOW, in consideration of the performance of the covenants and agreements as above set forth by the parties of the second part, and as compensation agreed upon for said work, the party of the first part covenants and agrees to pay, or cause to be paid to said parties of the second part during the progress of said work, and when the same shall have been completed and accepted as hereinafter provided, the sum of $16,775.00; said sum to be paid in regularly and legally drawn warrants upon the Treasury of the said party of the first part, and to be divided into two payments as follows:

FIRST: Seventy-Five per cent of one half of the

Contract price herein, shall become due and payable when one half of the work of constructing said Bridge is completed, provided, however, that said payment shall not be made before the 7th day of December, 1908.

SECONDLY: When the Bridge is completed, ready for travel and accepted by the Board of Supervisors, then the balance remaining unpaid, shall be due and payable, Provided, however, that the remainder of the contract price of said [73] Bridge shall not be payable prior to the first Monday in May, 1909.

AND IT IS FURTHER EXPRESSLY UNDERSTOOD AND AGREED, between the parties hereto.

First: That the plans and specifications filed with the County Clerk shall constitute a part of this Contract, and that said construction, erection, and work, shall be done and completed in a good and workmanlike manner, according to said plans and specifications; that the materials used shall be of first quality of its respective kind, and suitable for the purpose intended.

Second: That said party of the first part or their regularly appointed agent or superintendent shall at all times during the progress of said work, have free access thereto, and be allowed to examine the same, and all materials intended to be used in said structure, and if the same or any part thereof, shall not be in accordance with said Plans and Specifications, it shall reject and refuse to accept such defective work or materials, provided that such rejection of work and materials shall be made before their use.

Third: That the parties of the second part are to have the free use of the right of way over or upon which said work is to be performed, together with the right of way to and from said site, and sufficient room adjacent to the same, upon which to work, and the party of the first part is to save the parties of the second part harmless from any expense, delay or litigation on account of said right of way, or its right to let this contract.

Fourth: That said work shall be completed by the parties of the second part on or before May 1st, 1909, unless such completion is delayed by the act of God, high water, litigation or other unexpected circumstance. [74]

Fifth: Upon notice of the completion of said work, the party of the first part or its agent shall proceed without delay to examine the same, and if found to be in accordance with the aforesaid plans and specifications, and this agreement, shall accept such work, and shall notify the second parties or their agents of such acceptance.

Sixth: Said amount of $16,775.00 shall be paid in legally executed and regularly issued County Warrants of said Tuolumne County, the party of the first part agreeing to levy the necessary taxes, and to pay the same as required by law, and the parties of the second part to receive and accept the same at their par value.

Seventh: The ability to perform and the prompt performance of all terms, conditions and agreements of this contract by each of the parties hereto shall be a condition, precedent to the obligation of the other party to further pay or proceed hereunder.

IN WITNESS WHEREOF said party of the first part, acting in its representative capacity, by its Board of Supervisors, has caused these presents to be duly signed and subscribed, and its corporate name and seal to be attached by T. F. McGovern, Chairman, who is duly authorized and hereunto sets his hand as and for the act of said party of the first part and the said parties of the second part have caused their firm name to be hereunto subscribed by J. C. Will Jorgensen, a member of said firm, who is duly authorized, the day and year first herein mentioned.

COUNTY OF TUOLUMNE.
By T. F. McGOVERN,
Chairman Board of Supervisors,
County of Tuolumne.
JORGENSEN BROS.,
By J. C. WILL JORGENSEN. [75]

Plaintiff then offered, as a part of the contract just offered, the plans, drawings and specifications endorsed "Adopted July 20, 1908, T. F. McGovern, Chairman of the Board of Supervisors"; and filed with the County Clerk of Tuolumne County on July 20, 1908, and consisting of specifications entitled "Specifications for a reinforced concrete bridge across the Stanislaus River between Tuolumne and Calaveras Counties, near Melones, California," and six plans and drawings entitled as follows:

[Plaintiff's Exhibit No 2.]

1. "Stress sheet for reinforced concrete bridge across the Stanislaus River between Tuolumne and Calaveras Counties, California, N. J. Pickel, County Surveyor."

2. Entitled the same except that it gives the scale.

3. "Profile of bridge across the Stanislaus River, near Robinson's Ferry, for Tuolumne and Calaveras Counties, surveyed June, 1908, N. J. Pickle, County Surveyor, Tuolumne County, California."

4. "Map of site for bridge across Stanislaus River, near Robinson's Ferry, for Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor, Tuolumne County, California, June 1908."

5. "Proposed bridge across the Stanislaus River, between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor."

6. "Details of proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle."

Subject to the same objections, ruling and decision as were made upon the introduction of Plaintiff's Exhibit One, the said specifications and plans were admitted in evidence as one document and marked "Plaintiff's Exhibit 2," and plaintiff here prays as a part of this bill that the judge who presided at said trial make a rule or order for the safekeeping, transportation and return of said plans and drawings, said "Plaintiff's Exhibit [76] 2," so that the Circuit Court of Appeals may receive and consider such original papers in connection with this bill, and the transcript and proceedings.

That said specifications were in the words and figures following, to wit:

SPECIFICATIONS FOR A REINFORCED CONCRETE BRIDGE ACROSS THE STANISLAUS RIVER BETWEEN TUOLUMNE AND CALAVERAS COUNTIES, NEAR MELONES, CALIFORNIA.

LOCATION.

The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.

The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.

GENERAL DESCRIPTION.

The dimensions of this reinforced bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

The approaches at either end of the concrete bridge will consist of an earth and stone fill of lengths as shown on the profile plan and shall be bid on at a price per cubic yard. Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

FOUNDATIONS.

Are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bed rock. It is assumed that the bed rock on each side of the river will be found at a depth shown on plans. [77] Should it be determined that it is necessary to go to a greater depth than this to reach bed rock this work

shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation.

For the pier that is to be placed in the river the contractor will be permitted to deposit not more than 4 feet of concrete in the water to seal the bottom of the forms. In depositing this concrete he shall resort to some device that will prevent the washing out of the cement while the concrete *w* is passing through the water. No concrete under any conditions will be permitted to be deposited in running water. After the concrete which is deposited in the bottom of the pier for the purpose of sealing it, has become sufficiently set the contractor will then be required to pump out the piers and keep them clear of water during the operation of casting the balance of the concrete.

CONCRETE.

The concrete shall be fabricated of Portland cement, sand and broken rock or gravel. Either rock or gravel may be used at the option of the contractor. All concrete that is to be deposited in water shall be made of one part of cement to 4 parts of aggregates. The concrete in the foundations not placed in the water will consist of one part of cement, 2 parts of sand, and 5 parts of gravel. Concrete in the arch rings will consist of one part of cement, 2 parts of sand and 4 parts of gravel. All concrete shall be thoroughly mixed twice dry and once wet and rammed until water stands on the surface.

Concrete shall be placed in layers of not to exceed 8 inches. Before depositing any fresh concrete on

that which has already set, the surface of the cold concrete shall be thoroughly cleaned and roughened and then dusted with dry cement. Upon removal of the forms if any surface pockets are exposed the contractor [78] shall immediately fill them with cement mortar consisting of one part of cement and two parts of sand. Forms shall remain in place 10 days before stripping.

The cement to be used will consist of any well established brand and will conform to the conditions prescribed by the Committee on cement tests of the American Soceity of Civil Engineers, which requires that for fineness not less than 92% by weight of the cement must pass through a sieve of 100 meshes to the inch, and not less than 75% by weight must pass through a sieve of 200 meshes to the inch. The minimum tensile strength for neat cement per square inch must be as follows:—

150 lbs. for 24 hours (in air until hard and set, in water the remainder). 450 lbs. for 7 days (one day in air and 6 days in water). 550 lbs. for 28 days (one day in air and 28 days in water).

Briquettes made of one part cement to 3 parts of sand shall develop a minimum tensile strength per square inch as follows:

150 lbs. for 7 days (one day in air and 6 days in water), 225 lbs. for 28 days (one day in air and 27 days in water). Each car load of cement received at the bridge site shall be tested by the Engineer in charge before being placed in the work.

REINFORCED MATERIALS.

The reinforcement of this bridge shall consist of corrugated steel bars of sizes as noted on plans.

These bars must have an elastic capacity of not less than 50,000 pounds per square inch, and an elogation not to exceed 12% in 8 inches. Where it is found necessary to lap the bars the laps shall not be less than 2 feet. All reinforcement shall be placed accurately in position and any carelessness on the part of the contractor in performing this will be considered sufficient ground for the engineer in [79] charge to require the removal of the work and the replacement of it correctly.

FILLS.

The contractor will be required to make the necessary fills between the spandrel walls and from end of wing wall to end of wing wall covering a distance of 350 feet. On top of this fill shall be spread a layer of gravel which is to be thoroughly wet and rolled for wearing surface. The deck shall have a crown of at least 5 inches.

APPROACHES.

The approach on each end of the bridge shall be an earth and stone fill for a distance and to the grade as shown on the profile plan. Rock retaining walls to protect the fills, so much as shall be considered necessary by the engineer in charge, shall be built by the contractor at a price per cubic yard, to be bid on the same as the approach fills.

HAND RAILING.

The railing shall consist of 2½ inch standard pipe securely screwed together with the proper couplings. The posts shall be embedded one foot in the concrete felloe guard and spaced as shown in the accompanying plan.

GENERAL PROVISIONS.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure. [80]

All materials and workmanship shall be the best of their several kinds and all be under the supervision and to the satisfaction of the Board of Supervisors of each County and the Engineer in charge of the work.

During the absence of the contractor from the work his foreman or a designated agent shall be held to represent him. Instructions given by the authorized engineer to the contractor's foreman shall be considered as having been given to the contractor himself.

Specimens of the material used shall be furnished the engineer in charge of the work for examination and testing at his request and without charge.

All materials rejected by the Engineer in charge for either quality, shape, or workmanship that is not strictly in conformity with and to these specifications and the accompanying plans, shall be removed from the premises and the proper material substituted without delay or extra charge. And should

the contractor fail to complete this bridge in the time specified in the contract hereinafter mentioned, the public may use any portion of the bridge, but such use shall not constitute an acceptance thereof.

These specifications and drawings are the property of the said Board of Supervisors, and shall be returned to them upon the completion of the said contract.

Upon the completion of this bridge, all machinery, or material that does in any way obstruct the road-way, either on the bridge or its approaches, shall be removed by the contractor and said road-way left in condition to travel over as per plans and specifications.

PROPOSALS.

Proposals from Contractors for the construction of [81] this bridge and its approaches will be received not later than 2 o'clock P. M., on the 24th day of August, A. D. 1908, at the office of the Board of Supervisors of Tuolumne County.

All proposals must be accompanied by a certified check on some solvent bank of this state for a sum equal to 10% of the amount of such proposals and made payable to the said Board of Supervisors. Conditioned that if the said contract is awarded to such contractor and a satisfactory bond in a sum equal to the full amount of the proposal be furnished within ten days after the award of contract, then this check shall be returned to the said contractor, or his duly appointed agent, or a failure so to do will cause a forfeiture of such check as liquidated damages for such failure.

CONTRACT AND BOND.

A contract and bond as above mentioned shall be required and the said Board of Supervisors shall have the right to reject any and all proposals or to readjust the same, to pass upon the sufficiency of the securities or to disapprove of any and all bondsmen.

Plaintiff then offered and the court admitted in evidence resolutions of the Board of Supervisors of the County of Tuolumne showing that the adoption of said plans, drawings and specifications; the publication of notice of proposals for bids; the construction of said bridge; the acceptance of the bid of Jorgensen Bros., and the making of the said contract had all been duly ordered; and the following resolutions of the Board of Supervisors of Tuolumne County, the same being a part of Plaintiff's Exhibit 3, reading as follows: **[82]**

[Plaintiff's Exhibit No. 3.]

"Board of Supervisors, Tuolumne County,
Wednesday, February 23, 1910.

Board met pursuant to adjournment.

Present: T. F. McGovern, Chairman; A. S. Mackenzie, Paul Morris and V. A. Solari, Supervisors; J. B. Doyle, Clerk.

At this time Supervisor Morris moved the Board that whereas it appearing to this Board that from the certificate of the County Surveyor that the bridge across the Stanislaus River at Melone's has been completed in accordance with the contract, the plans and specifications; it is hereby ordered by this Board that the following claims filed with this Board by the Jorgensen Brothers, Contractors, who constructed

said bridge, be and the same is hereby allowed and ordered paid as full payment of amount due said Jorgensen Brothers for the construction of said bridge, in accordance with the contract, plans and specifications, to wit:

$10,487.37; $369.38; $581.27; $610,—and that certain bills filed by said Jorgensen Brothers purporting to be for alleged extra work and materials on the piers and wing walls of said bridge, to wit, the sum of $9,576.55, be and the same is hereby rejected.

Seconded by Supervisor Solari. * * * * * Motion carried unanimously."

"Board of Supervisors, Tuolumne County, California

Tuesday, March 8th, 1910.

Present: T. F. McGovern, Chairman; A. S. McKenzie, S. A. Ferretti, V. A. Solari, and Paul Morris, Supervisors. J. B. Doyle, Clerk.

In the Matter of the Construction of the Bridge Across the Stanislaus River at Melone's.

[83]

This Board having heretofore ascertained from the certificate of the County Surveyor, that the said Bridge has been constructed and completed in accordance with the Plans and Specifications, and this Board having on the 22d day of February, 1910, allowed and ordered paid to the Jorgensen Bros., Contractors, as full payment of the amount due said Jorgensen Bros. for the construction of the said Bridge, in accordance with the Contract and Plans and Specifications, One Claim of $10,484.37, as balance due on the Contract price, one claim of $369.38,

one claim of $581.27, and one claim of $610.00, on account of extra work, and this Board having on said date rejected one claim of said Jorgensen Bros. for the sum of $9,576.55, for alleged extra work on said Bridge and interest;

NOW, at that time upon a reconsideration of said matter, IT IS ORDERED that said claim of $10,-484.37 be, and the same is hereby, allowed and ordered paid as payment in full of the amount due on the contract price for the construction of said bridge, and that the same claim of $9,576.55, be and the same is hereby rejected.

Board adjourned.

T. F. McGOVERN,
Chairman.

Attest: J. B. DOYLE, Clerk."

Plaintiff then offered the notice asking for bids which was published by the county and which was admitted in evidence, marked "Plaintiff's Exhibit 4," and in the words and figures following, to wit:

[Plaintiff's Exhibit No. 4.]

NOTICE TO CONTRACTORS.

Notice is hereby given that the Board of Supervisors of Tuolumne County, State of California, will receive sealed bids for the construction of a reinforced concrete bridge over the Stanislaus River at Melones, connecting Tuolumne and Calaveras counties, as per plans and specifications for the same prepared **[84]** by N. J. Pickle, County Surveyor, and adopted by the Board of Supervisors of Tuolumne County on Monday, July 20, 1908, and now on file with the Clerk of said Board.

Said sealed bids for said bridge will be received by said Board not later than Monday, Aug. 24, 1908, at 2 o'clock P. M.

All bids must be accompanied by a certified check on some solvent bank of this State in a sum equal to 10 per cent of the bid, payable to the chairman of the Board of Supervisors, the same to be forfeited in case of failure to sign contract and bond within ten days from the award of contract.

The Board reserves the right to reject any and all bids.

[Seal] Attest: J. B. DOYLE,
Clerk of Board of Supervisors of Tuolumne County.

Dated: July 22, 1908.

Plaintiff then offered the written bid made by Jorgensen Bros. and accepted by the county, which was admitted in evidence and marked "Plaintiff's Exhibit 5," and was in the words and figures following, to wit:

[Plaintiff's Exhibit No. 5.]

"San Francisco, August 22, 1908.

To Chairman of the Honorable Board of Supervisors,
Tuolumne County.

Gentlemen:

We hereby propose to do the following work, furnishing all the necessary labor, materials, scaffoldings, etc., etc., concrete arch bridge, located on the Stanislaus River near Melones and between Tuolumne and Calaveras Counties, California, for the owners, A. C. C., according to plans and specifications by Mr. Pickles, County Surveyor. In consideration for this work we ask the sum of $16,775

(Sixteen thousand seven hundred and [85] seventy-five dollars).

The time we ask for completion of work ——— days. All extra work on approaches, per yard, filling 35 cents per yard; stone or rock retaining wall, $4.00.

JORGENSEN BROTHERS,
B. J. C. WILL JORGENSEN."

It was admitted that the portion of said bid with reference to filling had nothing to do with the subject matter of the contract, that all the case had to do with was the center pier.

Plaintiff then offered in evidence the written assignment of the claim in suit by Jorgensen Bros. to plaintiff, from which it appeared that the claim in suit had been assigned by Jorgensen Bros. to plaintiff prior to the commencement of the action, and the same was admitted in evidence.

Plaintiff then offered in evidence a duly verified claim made by Jorgensen Bros., filed with and presented to the Board of Supervisors of Tuolumne County on February 4, 1910, and rejected by the Board February 23, 1910, which said claim was in the words and figures following, to wit:

Demand of Jorgensen Brothers:

No. . . . . Fund

Demand on the Treasury of the County of Tuolumne, State of California, for the sum of $9,576.55, Being for: Extra work on Melones Bridge. [86]

Date.	Items.	Amount.
Feb. 4, 1910.	Amount due for extra work, labor, supplies and Materials on center pier, as per itemized Statement hereto attached	$7956.63
" " "	Amount due for extra work and Materials furnished on pier on Calaveras side of River, and Wing-Wall and Center-Wall on Calaveras side	767.55
" " "	Amount due for cost of steel in constructing Wing-Wall and Center-Wall on Calaveras side of River..	143.00
	Interest on $8,867.18, from February 1st, 1909, to February 1st, 1910, one year @ 8% per annum...	709.37
	Total.....	$9576.55

Expenditure authorized and approved by me

.....

Do not write here.

READ THESE INSTRUCTIONS.

All claims against the County must be duly verified and filed with the County Clerk on or before three days prior to the First Monday in each month, and must be properly itemized, giving names, dates and particular service rendered, character of process served, upon whom, distance traveled, where and

when, character of work done, number of days engaged, supplies or material furnished, to whom, and quantity and price paid therefor, and must be certified to by the proper authority ordering the work, etc., before filing with the County Clerk.

CLERK'S CERTIFICATE.

State of California,
County of Tuolumne,—ss.

I, J. B. Doyle, County Clerk and ex-officio Clerk of the [87] Superior Court of said County and State, do hereby certify that the foregoing is a true and correct copy of the Two Claims of Jorgensen Bros. presented to the Board of Supervisors and filed on the 4 day of Feb., 1910, same being for work performed on Melones Bridge, $10,484.37/11 and $9,576.55, and of the endorsements thereon and the same is a correct transcript of the record thereof now in my office.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said Court, on this 9 day of Mar., 1910.

[Seal] J. B. DOYLE,
Clerk.

[Endorsed]:

State of California,
County of Tuolumne.

The undersigned, being duly sworn, says: That the within claim and the items as therein set out are true and correct; that no part thereof has heretofore been paid, and that the amount therein is justly due the claimant, and that the same is presented within one year after the last item thereof has accrued.

Jorgensen Bros. J. C. W. Jorgensen. Subscribed and sworn to before me this 4 day of Feb. 1910. J. B. Doyle, County Clerk. By J. B. Ryan, Deputy Clerk. Board of Supervisors, County of Tuolumne. Demand of Jorgensen Bros. On ..... Fund.

Dated ..... 190....

Filed Feb. 4, 1910. J. B. Doyle, Clerk of Board of Supervisors. J. B. Ryan, Deputy Clerk.

Rejected Feb. 23, 10. T. F. McGovern, Chairman Board of Supervisors.

No. 15,051. U. S. Circuit Court, Nor. Dist. of Cala. Pltffs. Exhibit 7. Oct. 27, '11. W. B. M., Deputy Clerk.

(Jorgensen Bros. Letter-head.)

Melones, Feb. 3d, 1910.

(1)	Extra Work	
	Labor Oct. 25th—Dec. 17th.....	$2913.35
	Gasoline	300.00
	Tools, Machinery and Belting.....	350.00
	Lumber in Cribbing, 15,500 B. M.....	310.00
	Nails	10.00
	Concrete in centerpier: 1:6.	
	Top 11'–wide, length 36'–6.	

[88]

	Bott. 12'–6. Wide Length 36'6.	
	Average area 382..	
	Height of Pier 24'–0.	
	382x24	
27	339.44 yds. @ $12.00.....	$4073.28
		$7956.63

(Jorgensen Bros. Letter-head.)

San Francisco, Feb. 3d, 1910.

(2) Extra work.

Last Pier on Calaveras side.

10 (5.5x4 –47.5 per foot of width of Bridge.

2.

47.5x21

27) 37 yards.

2 Wing Walls 2x6x14x20

12 27 10.35 Yards.

2 Center Walls 2x6″x17.2′ Long x 6′–°High.

3.82 Yards 51.17 Yard.

51.17 Yards @ $15.00, $767.55.

(Jorgensen Bros. Letter-head.)

Melones, Feb. 3d, 1910.

(3) Extra work.

Steel Enforcement.

Steel Reinforcement.

In Wing Walls	(V)	16–3/8	–6′–0
	(4)	18–3/4	25′–0
In Center walls		14 3/8	6′–0
		18 5/8	20′–0

Making of total of

864# of 3/4 bars.

479# of 5/8 "

87# of 3/8 "

1430# $143.00. [89]

Thereupon defendant objected to the introduction of said claim in evidence on the ground that said

claim was not duly or at all itemized as required by law; because said claim was not approved by any officer of defendant who authorized said claim or the expenditures contained therein against said county; and for the further reason that said claim was not filed or presented within one year after the accrual thereof.

Whereupon the Court, upon stipulation between plaintiff and defendant, reserved its ruling upon said objection until final argument, and admitted said claim (marked "Plaintiff's Exhibit 7") in evidence; to which action and ruling of the Court defendant then and there reserved an exception on the grounds stated.

[Testimony of J. C. Will Jorgensen, the Plaintiff]

Whereupon J. C. WILL JORGENSEN was called as a witness for plaintiff, sworn, and testified as follows:

My name is J. C. W. Jorgensen.

I am the plaintiff in the action.

I am a member of the firm of Jorgensen Bros.

I am the party to whom Jorgensen Bros. assigned the claim in suit.

H. H. Will Jorgensen is a brother of mine.

We were partners in the contracting business.

Jorgensen Bros. constructed the bridge known as the concrete bridge across the Stanislaus River at Robinson's Ferry.

I did the actual figuring on the work that resulted in the bid for the construction of the bridge. Prior to making the bid I received from Tuolumne County for the purpose of enabling me to make the bid a

(Testimony of J. C. Will Jorgensen.)

copy of the specifications hereinbefore introduced and the following plans and drawings, namely, the plan marked "Proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor"; **[90]** also the one marked "Details of proposed bridge across the Stanislaus River between Tuolumne and Calaveras Counties, N. J. Pickle, County Surveyor." Before presenting my bid to the County of Tuolumne, on behalf of Jorgensen Bros., I visited the ground in accordance with the direction in the specifications and found that it compared pretty fairly with the nature of the ground, the conformation of the ground, the presence of bedrock, as compared with the sheet marked "Plan of proposed Bridge," and it gave me the impression that the profile I received was made according to the natural conditions. After we were awarded the contract the firm proceeded to construct the bridge. My brother was there when the center pier was constructed; I was not.

Cross-examination.

(By Mr. CAMPBELL.)

Mr. CAMPBELL.—Q. How much examination did you make of the river before you made the bid?

A. I went all over the bridge site and walked all over the ground and looked at it and went on the upper and lower side of the bridge site in order to see how the profile conformed with the blue-print profile I got.

Q. And according to your examination at that time, as you saw it, you imagined or you concluded

(Testimony of J. C. Will Jorgensen.)

that the profile showed it all right? A. Yes, sir.

Q. Did you make any examination to get down to bedrock at all?

A. No, I could not very well do it.

Q. There is a way of doing that, is there not?

A. Certainly.

Q. You say that you had before you the specifications before you put in your bid? A. Yes, sir.

Q. You read them over? A. Oh, yes.

Q. You are a contractor? A. Yes, sir.

Q. You are an engineer, are you not?

A. Yes, sir.

Q. What experience have you had in business?

[91]

A. Oh, we have been in business for the last seven years.

Q. You understood the specifications at the time you examined the ground at the river?

A. Yes, sir.

Q. And you had before you this provision in the contract: "Foundations are to be constructed substantially as shown on the plans"? A. Yes.

Q. "The footing of piers, abutments and wing-walls will be thoroughly imbedded in the bedrock"?

A. Yes.

Q. "It is assumed that the bedrock on each side of the river will be found at a depth shown on the plans; should it be determined that it is necessary to go to a greater depth than this to reach bedrock, this work will be done by the contractor without additional expense to either party."

(Testimony of J. C. Will Jorgensen.)

Q. You had that before you, did you?

A. Yes, sir.

Q. And you understood it? A. Yes, sir.

Q. Now, what did you understand, that it was only an assumption as to the bedrock on the sides of the river? A. Yes, because that is what I could see.

Q. You could see that? A. Yes, just about.

The COURT.—Q. Were there natural conditions there such as enabled you to determine the depth of the bedrock on the sides of the stream?

A. Yes, sir; the bedrock there is par*ty* exposed and has been washed off by the prevailing rains, and so on. The natural formation shows.

Mr. CAMPBELL.—Q. And you assumed, then, that you could see the bedrock in the sides of the river, and you assumed that when the plans stated, or rather when the specifications stated, "It is assumed that the bedrock on each side of the river will be found at a depth shown on the plans," but if it should not be so then you had to do the work at your own cost? A. Yes. [92]

Q. And you did not make any examination for the purpose of determining the bedrock in the middle of the river? A. No, sir.

Q. Where you could not find it out?

A. No, sir; I could not find it out. You could do it to a certain extent, by putting down expensive drilling apparatus, thing like that, to get to that depth there, but I concluded, with the line on both sides, with the natural profile of the ground on both sides, conforming so identical with the blue-prints,

(Testimony of J. C. Will Jorgensen.)

I understood there must be some kind of soundings or some kind of evidence put up to the man who made the survey of this thing that would enable him to place the foundation of the center pier within say an inch, or a couple of feet, or something like that, of the location he made.

The COURT.—Q. Within a reasonable distance?

A. Yes, sir.

Mr. CAMPBELL.—Q. You assumed that because of being on the ground and looking at it?

A. Yes.

Redirect Examination.

WITNESS.—There was water at that point in the middle of the river where the center pier was. The width of the main spread over the stream that would be filled in time of flood was about 200 feet.

Recross-examination.

WITNESS.—I did not ask anyone if they had made any soundings.

Q. You were familiar as you say with the specifications? A. Yes, sir.

Q. And the specifications said that you must imbed the piers in bedrock? A. Yes, sir.

Q. And that in any event you were to do all the work that was necessary to be done in that?

A. Yes; in any event, so far as [93] I remember the specifications they said I had to do all the excavating there on both sides of the river for the piers.

Q. What were you to do in the middle of the river, as you call it, for the center pier? Were you not going to do any excavating in that?

(Testimony of J. C. Will Jorgensen.)

A. Yes, I was going to do the work according to the plans.

Q. According to the plans?

A. Yes, sir, to go down to that depth, 27 feet and 6 inches mentioned on the plans.

Q. And you were not to do it according to the plans on either side?

A. Of course I was, but the specifications there says that there might be a loose rock, or something like that, something there. Now, suppose I had to take that rock away in order to get a firm foundation, I had to go down to that and provide a good foundation there.

Q. And you had to go down to what you call the center pier to provide a good foundation there, did you not?

A. I had to go down 27 feet and 6 inches; that is what I figured on.

Q. You believed, at the time that you made this bid, that your contract required you to put all foundations down to bedrock, did you not?

A. Yes, it is a part of the engineer's judgment in forming an arch construction, you have to support all piers to an even bearing capacity, otherwise you would create uneven settlement and that would cause a cracking in the construction.

Q. And you could not see bedrock on either side of the river, or in the center?

A. I could see bedrock on the sides of the river.

Q. You could see it on the sides of the river?

A. Yes, in some places.

(Testimony of J. C. Will Jorgensen.)

The COURT.—Q. How high were the banks? [94]

A. Well, the banks extended quite high upon both sides; it all depended upon how high you consider the banks.

Q. Was it a torrential stream?

A. Yes, sir; quite a heavy stream in the rainy season and quite calm in the summer season.

Q. It is in the hills, is it not?

A. Yes, sir, in the lower hills.

Mr. CAMPBELL.—Q. How far did you have to excavate on either side to get down to bedrock?

A. In some places according to the plans and in some places below.

Q. I mean how far below the plan?

A. Well, I could not say; some places 6 inches, in other places a foot, and in some places a couple of feet.

[Deposition of H. H. Will Jorgensen.]

The deposition of H. H. WILL JORGENSEN was then offered and read with the understanding that if there was anything in the deposition that went to any issue not made by the pleadings, that plaintiff would not waive the point that no issue was made by the answer, in case none was so made, it appearing that the deposition was taken before the answer was filed, the deposition being in substance as follows:

The witness stated his name as Hans Henry Will Jorgensen.

Born in Copenhagen, Kingdom of Denmark.

Am 30 years old.

(Deposition of H. H. Will Jorgensen.)

Reside in the city of San Francisco.

Have never been naturalized.

Am a citizen and subject of the King of Denmark.

The firm of Jorgensen Bros. is a partnership.

My brother J. C. Jorgensen and myself constitute the partnership.

I am an engineer.

Am a graduate of Chalmers' Technical School at Gennerberg, Sweden. **[95]**

I am a contracting engineer.

Engaged in that business since December, 1905.

I am familiar with plans and drawings, their meaning and significance.

I know what the marks, lines and other delineations upon plans and drawings are used for by draftsmen.

I can read plans and know what they mean.

The firm of Jorgensen Bros. entered into a contract with the County of Tuolumne on or about the 8th day of December, 1908, for the construction of a bridge.

The construction of the bridge commenced about the 15th of September, 1908.

I personally had charge of the construction up to the time of the completion of the bridge.

The bridge is located on the Stanislaus River at the crossing called Robinson's Ferry.

It is a reinforced concrete bridge.

There are two piers—one pier on the Tuolumne side, one pier in the center of the river and two piers on the Calaveras side.

Prior to the making of this contract the County of Tuolumne had prepared and filed with the County

(Deposition of H. H. Will Jorgensen.)

Clerk and ex-officio clerk of the Board of Supervisors of the County of Tuolumne plans and specifications for the construction of the bridge.

I saw the plans in September sometime.

I was furnished by the County of Tuolumne with a copy of these plans and specifications for the purpose of constructing the bridge.

The witness was then shown a drawing or blue-print marked "Proposed bridge across the Stanislaus River between Tuolumne [96] and Calaveras Counties, N. J. Pickle, County Surveyor." (This is the same blue-print of plan heretofore introduced in evidence and being No. 5 of "Plaintiff's Exhibit 2.")

(Witness continuing:) This blue-print or drawing is one of a set of plans that were furnished me by the County of Tuolumne for the construction of the bridge. The perpendicular lines near the middle of the drawing represent the pier in the center of the river. The horizontal hachured, or broken lines, represent water out in the river. The white line on top indicates the contour line of the bed of the river. Immediately below the contour line is a number of white dots. They indicate the gravel or mud. Immediately below these dotted white points indicating gravel is another white line running horizontally across the bed of the river; this is a contour line for something below. Below this contour line are some hachured lines, cross-lines, crossing each other; they indicate rock.

Q. Then, from your reading of this plan I will ask you whether or not the marks and lines upon this

(Deposition of H. H. Will Jorgensen.)

plan give the location of the bedrock in that river at the place where this pier in the river is located, definitely, accurately, or otherwise?

A. They indicate it definitely.

Q. Are these plans drawn according to scale?

A. Yes.

(Witness continuing:) The collar of the arch is placed about two feet below the grade of the bridge. The spring line of the arch is the line where the arches start. It is an imaginary line drawn across the construction at a level at the point where the arch starts. Where they abut upon the piers. It is not marked upon the plan. It would fall at the top of the pier about six inches above the coping. [97] This plan and the drawing of this pier in the river upon the plan indicates and represents the depth from the spring line of the arch to the place where bedrock is marked upon the plan. It shows it by scale. The distance from the spring line of the arch to the bedrock as marked upon this plan at this pier in the bed of the river is 27 feet 6 inches. I was in charge of the excavations for the foundation of this pier in the middle of the river. The excavations were carried on with a cofferdam and ordinary sheathing and lagging. We proceeded to excavate here through this place marked upon the plan as gravel and mud, from the bottom of the water down into the gravel.

Q. Now, from the top of the gravel as marked upon this plan to the bedrock as marked upon this plan what was the distaince that you were compelled to excavate to this place here where it is marked bed-

(Deposition of H. H. Will Jorgensen.)

rock, the distance you had to go through this gravel to this place here where bedrock is marked upon this plan? A. It was forty-one feet and six inches.

Q. Forty-one feet and six inches.

A. That gravel-bed is not located there; it is located up here. (Indicating.)

Q. I will ask you this question. What is the distance according to the scale of this plan between the top of the gravel as marked upon this plan and the top of the bedrock as marked upon this plan? You understand the question?

A. This plan is not accurate.

Q. I am asking you what the depth of this gravel is here as marked upon this plan?

A. Well, on this plan it is marked something like two feet.

Q. Well, measure it out and tell me what the depth of that gravel is as marked upon this plan right underneath this pier in the river?

A. Two feet six. [98]

Q. When you had carried on your excavations for the foundation of this pier in the river to this place where bedrock is marked upon this plan state what you found there?

A. I found gravel and boulders.

Q. State whether or not you found bedrock at this place where it is marked upon the plan.

A. I did not find bedrock.

(Witness continuing:) N. J. Pickle is County Surveyor of Tuolumne County. He was the agent and superintendent for the County of Tuolumne

(Deposition of H. H. Will Jorgensen.)

having charge of and supervision over the construction of the bridge. He was there giving directions and inspecting and supervising the work. He was present while we were making the excavations. Looking down in the hole. He was there frequently. He was looking over the work, and watching the progress of it.

The County of Tuolumne sent him there. He was supervising the work that we were doing. A short time after—a week or two after—we reached the place where bedrock is marked upon the plan I had a conversation with Mr. Pickle. When we got to this place where bedrock was marked upon the plan we continued our excavations downward. Mr. Pickle could see for himself that we had not found bedrock. I had a conversation with him. He said we had to get to bedrock to get a solid foundation. He requested us to get down to bedrock and to continue our excavations. We found bedrock at 24 feet below the depth found on the plans. When we were making our excavations here we had commenced the construction of other parts of the bridge. We had completed four auxiliary piers to carry the superstructure and part of the superstructure. We had completed the sub-stringers on the two spans on the Calaveras side, and the two spans on the Tuolumne side, next to the respective sides of the river. [99] The bottom of the pier on the Tuolumne side was framed up. We had commenced our excavation for that. Also for one of the piers on the Calaveras side, the second one from the shore. We had been working about a month

(Deposition of H. H. Will Jorgensen.)

and a quarter on the bridge. The fact that we had to continue our excavations downward an additional distance of 24 feet to bedrock increased the cost of the construction of the bridge in the sum of $7,956.63. This amount was the fair and reasonable value of the additional work. This additional excavation of 24 feet required a time from the 25th of October until the 17th of December, 1908. Mr. Pickle first knew that the bedrock was not at the place where it was marked upon the plan sometime after the 25th of October. He was there off and on; sometimes every week and sometimes every second week. When Mr. Pickle first saw it or knew of it we were four or five feet down below the place where bedrock is marked upon the plan. Mr. Pickle was notified when we reached bedrock. He satisfied himself that bedrock was reached. The supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier. This pier could not have been safely erected on the foundation of gravel and boulders, because the design of this structure indicated foundation in bedrock.

Q. Well, would it have been safe to put the pier upon the gravel and boulders that you found there?

Mr. CAMPBELL.—Anybody knows it would wash out. I will admit that.

A. It might wash out.

Cross-examination.

Mr. CAMPBELL.—Q. You are a member of the firm of Jorgensen *Brother*?

A. Yes. [100]

(Deposition of H. H. Will Jorgensen.)

Q. I show you what purports to be a proposal dated August 26th, 1908, "Jorgensen Brothers" printed and the name signed there "J. C. Wm. Jorgensen," isn't it? A. Yes.

Q. Is that your signature? A. No, sir.

Q. Whose is it? A. My brother's.

Q. He is a member of the firm? A. Yes.

Q. Look at that, please. I will mark it Defendant's Exhibit "A." Is that the bid or proposal made by Jorgensen Brothers to the County of Tuolumne to erect this bridge? A. Yes.

Q. I notice in this proposal that you agree with the owners to erect this bridge according to plans and specifications by Mr. Pickle, County Surveyor; that is so, isn't it? A. Yes.

Q. Had you the specifications before you when you figured on this bridge? A. That, I don't know.

Q. Why don't you know?

A. My brother had charge of that.

Q. You did not put in the figures? A. No, sir.

Q. Did you see the specifications accompanying the plans? A. Not at that time.

Q. Well, at the time you signed the contract?

A. I did not sign the contract.

Q. Your brother signed the contract? A. Yes.

Q. Then, you don't know anything about the specifications upon which the bid was made, do you?

A. Not at that time.

Q. When did you first learn of them?

A. In September some time.

Q. Was that before or after you found out about

(Deposition of H. H. Will Jorgensen.)

the bedrock? A. Yes, it was before that.

Q. Did you make any objections then to the specifications? A. What do you mean by objections?

Q. Well, did you make any objections that the specifications were not full, clear and specific? **[101]**

A. No, I did not make any.

Q. You did not make any? A. No, sir.

Q. You did a great deal of extra work on this bridge, approaches and other matter and work that was not mentioned in the contract? A. Yes.

Q. You did? A. Yes.

Q. And you put in your bills to the County of Tuolumne for that? A. Yes.

Q. When were you paid for the extra work outside of this that you now claim?

A. From time to time.

Q. Do you remember when the bridge was accepted? A. The 9th of February.

Q. 1910? A. Yes.

Q. You have been engaged in the contracting business in America for how long?

A. Since December, 1905.

Q. You are familiar with plans and specifications?

A. Yes.

Q. You understand plans and read English?

A. Yes.

Q. And your brother has been your partner all of those times? A. Yes.

Q. Now, then, how did you arrive at the amount which you charged for this excavation under this center pier to get down to bedrock?

(Deposition of H. H. Will Jorgensen.)

A. From data and from memory.

Q. What do you mean—that you charged by the cubic yard of excavation, or did you charge by the time used and the wages of the men and so forth—how did you arrive at the exact cost of it?

A. The labor is charged in the exact amount, or as exact as could be stated, and the concrete is charged at so much per cubic yard, and the other bills that we received.

Q. You charged what you say it cost you. The signing of the contract and the figuring on the contract was done by your [102] brother, you say?

A. Yes.

Q. All you did was to superintend the work?

A. Yes.

Annexed to the deposition and made an exhibit to it was the bid of Jorgensen Bros., being "Plaintiff's Exhibit 5" hereinbefore introduced in evidence.

The following proceedings were then had:

Mr. WEHE.—Gentlemen, I understand the bridge was completed and accepted by the county—it was completed before but it was accepted by the county either in the last of January or the 1st of February, 1910. Will that be admitted?

Mr. SHELTON.—Yes, with the understanding, too, that this stipulation is not in contradiction of the minutes of the Board of Supervisors. We accepted the bridge at the same time that we rejected the claim for extra work for which you sue now. That is correct, is it not?

Mr. WEHE.—No, the bridge was accepted before that time.

Mr. CAMPBELL.—It all came up at one time.

Mr. SHELTON.—It all came up at one time so far as the action of the board is concerned.

The COURT.—You are speaking of the formal acceptance by the action of the Board?

Mr. WEHE.—Oh, yes. But the bridge was used by the public and open to the public toward the last of January, 1910.

It was admitted by the parties that at the request of defendant, plaintiff furnished a bill of particulars, and that the facts stated in the bill of particulars were true, the bill of particulars being in the words and figures following:

"In response to the demand for bill of particulars made by defendant, and without waiving anything at all by compliance with said demand, said plaintiff delivers the following items [103] and dates of actual cost of center pier on bridge described in said complaint below where bedrock was represented to exist on plans submitted to plaintiff by defendant as follows:

Amount expended for labor in the excavation of the shaft to contain the portion of the said pier for which the demand is made in the complaint.....$2,913.35

Said labor does not include the labor for the actual construction of the portion of the pier below said point, the labor therefor being included within the $12. per cubic yard cost thereof. The payrolls for said labor are in our possession and subject to inspection.

Gasoline for running pumps	300.
Tools, machinery and belting	350.
Lumber used in cribbing, 15,500 B. M.	310.
This cribbing was of no value after use and was left in the shaft. It was impossible to get it out.	
Nails	10.
Concrete in center pier below said point 1:6 top 11 feet wide, 36 feet 6 inches long; bottom 12 feet 6 inches wide, length 36 feet 6 inches; average 382 square feet; height of extra portion of pier 24 feet, containing 339.44 cubic yards at $12 per cubic yard	4,073.28
Total	7,956.63

The said excavation above mentioned was completed on December 17th, 1908.

The mixing of said concrete and placing of the same in the pier was completed up to the point where bedrock is represented to exist on the said plan by the 21st or 22d of December, 1908. [**104**]

The entire bridge was completed and ready for delivery on or about the 1st of February, 1910."

Thereupon plaintiff rested, and defendant moved the Court for a nonsuit, and in that behalf made the following statement of its grounds therefor:

Mr. CAMPBELL.—If your Honor please, the defendant now moves the Court for a nonsuit upon the ground that the plaintiff has failed to establish the allegations in the complaint; that their proof has failed to make a case to go to the jury which shows the defendant to be responsible to the plaintiff; they

have shown by their testimony that the contract was an entirety, involving the plans, the specifications and the drawings, if you please. The amount of the contract was agreed upon to be a certain amount, which it is admitted has been fully paid by the county.

It brings us to this proposition; if there is any claim here, and the action must be upon the claim * * * that a person suing the county must sue upon a claim. There was no claim made for damages, that is, there was no claim made to the Board of Supervisors for damages by reason of any breach of warranty on the part of the county or any of its officers. All the claim that was made was for extra work done outside of the contract. This is the only claim that is plead.

The next ground is that they did not present the claim within a year from the time that the work was done, and the material furnished.

Whereupon, after argument, the Court granted the motion for nonsuit, and plaintiff duly excepted to the ruling as provided for by Rule 60 of the rules of this Court.

Inasmuch as the said several matters hereinbefore set forth [105] and inserted in this bill of exceptions do not appear of record, and the plaintiff having, within the time allowed by law, presented the same for settlement and allowance after due notice given, and amendments made thereto, the same is hereby settled and allowed, and made a part of the record in said cause this 30th day of December, 1911.

WM. C. VAN FLEET,
District Judge, Presiding.

[Endorsed]: Filed January 2d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [106]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Petition for Writ of Error.

J. C. Will Jorgensen, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Circuit Court of the United States, Ninth Circuit, Northern District of California, predecessor of this Court, made and entered in said court on the 27th day of October, 1911, granting the motion of defendant for nonsuit herein; and the judgment of dismissal and for costs entered in said Court on the 27th day of October, 1911, all in favor of the defendant and against said plaintiff, comes now by F. J. Solinsky, Paul C. Morf and Frank R. Wehe, his attorneys, and petitions this Court for an order allowing him to prosecute a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit to review the said decision and judgment of this Court herein, under and according to the Statute of the United States of America in that behalf made and provided,

and that an order be made fixing the amount of a bond for costs said plaintiff shall furnish upon said writ of error.

And your petitioner will ever pray, etc.

Dated this 15 day of February, 1912.

J. C. WILL JORGENSEN,
Petitioner.

By F. J. SOLINSKY,
PAUL C. MORF,
FRANK R. WEHE,
His Attorneys. [107]

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,051.

J. C. WILL JORGENSEN,
Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant.

Assignment of Errors.

J. C. Will Jorgensen, plaintiff in the above-entitled action by F. J. Solinsky, Paul C. Morf and Frank R. Wehe, his attorneys, hereby assigns the following errors of the Circuit Court of the United States, Ninth Circuit, Northern District of California, the predecessor of this Court, and in which court the said

action was tried, upon which plaintiff will rely in case his petition for writ of error is granted, and which he will urge upon the prosecution of said writ of error in the United States Circuit Court of Appeals for the Northern District of California:

1. The Circuit Court of the United States, Ninth Circuit, Northern District of California, the predecessor of this Court, erred in its decision granting defendant's motion for a nonsuit herein.

2. The said Court erred in entering judgment in this action dismissing the said action.

3. The said Court erred in ordering judgment for defendant for its costs herein.

Dated this 15 day of February, 1912.

F. J. SOLINSKY,
PAUL C. MORF,
FRANK R. WEHE,

Attorneys for Plaintiff J. C. Will Jorgensen. [109]

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Order Allowing Writ of Error.

Upon motion of plaintiff and upon filing the petition for a writ of error and assignment of errors herein, it is ordered that a writ of error be, and it is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein and other matters and things in said assignment set forth, upon plaintiff filing a bond herein in the sum of Three Hundred ($300) Dollars.

Dated February 15, 1912.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Feb. 15, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[111]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, J. C. Will Jorgensen, said plaintiff, as principal, and American Bonding Company of Baltimore,

a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact a surety business within the State of California, as surety, are held and firmly bound unto the above-named defendant, County of Tuolumne, a municipal corporation of the State of California, its successors and assigns, in the sum of Three Hundred (300) Dollars, lawful money of the United States of America, for the payment of which sum, well and truly to be made each of the undersigned binds himself and itself jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas the said plaintiff has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to review the decision and judgment of the Circuit Court of the United States, Ninth Circuit, for the Northern District of California, the predecessor of the District Court of the United States, Northern District of California, Second Division, made by said Court and entered therein on the 27th day of October, 1911. [112]

NOW, THEREFORE, if the said plaintiff shall prosecute said writ of error to effect and shall answer all costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and effect.

J. C. WILL JORGENSEN.

[Seal American Bonding Co.]

AMERICAN BONDING COMPANY OF BALTIMORE.

By WALTER W. DERR,
Agent and Attorney in Fact.

Approved:

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Feb. 20, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[113]**

In the District Court of the United States in and for the Northern District of California.

No. 15,051.

J. C. WILL JORGENSEN,

Plaintiff,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,

Defendant.

Certificate of Clerk U. S. District Court to Record on Appeal.

I, Jas. P. Brown, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing one hundred and thirteen (113) pages, numbered from 1 to 113, inclusive, to be a full, true and correct copy of the record and proceedings in the above and

therein entitled cause, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $66.40; that said amount was paid by Frank R. Wehe, attorney for the above-named plaintiff; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of March, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. **[114]**

[Citation.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to County of Tuolumne, a Municipal Corporation of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 20th day of March, 1912, being within thirty days from the date hereof, pursuant to a Writ of Error issued in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein J. C. Will *F*orgensen is plain-

tiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth Judicial Circuit, this 20th day of February, A. D. 1912.

WM. W. MORROW,
United States Circuit Judge.

Service of within Citation, by copy, admitted this 20th day of February, A. D. 1912.

J. C. CAMPBELL,
Attorney for Defendant in Error.

[Endorsed]: No. 15,051. In the District Court of the United States, Northern District of California. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Citation. Filed February 21, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

[Writ of Error.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court, before you, or some of you, between J. C. Will Jorgensen, plaintiff in error, and County of Tuolumne, a Municipal Corporation of the State of California, defendant in error, a manifest error hath happened to the great damage of the said J. C. Will Jorgensen, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 20th day of March, 1912, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge, Northern District of California, this twentieth day of February,

in the year of our Lord one thousand nine hundred and twelve.

[Seal] JAS. P. BROWN,
Clerk of the District Court of the United States, for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by
WM. W. MORROW,
Circuit Judge.

Service of within Writ and receipt of a copy thereof is hereby admitted this 20th day of February, 1912.

J. C. CAMPBELL,
Attorney for Defendant in Error.

The answer of the Judges of the District Court of the United States in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 15,051. District Court of the United States, Northern District of California. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Writ of Error. Filed February 21, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. **[116]**

[Endorsed]: No. 2121. United States Circuit Court of Appeals for the Ninth Circuit. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, a Municipal Corporation of the State of California, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed March 27, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

Order Enlarging Time to File Record Thereof and to Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause have to and including March 29, 1912, within which to docket the cause and file the Transcript of Record on Writ of Error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 19, 1912.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: No. 2121. In the U. S. Circuit Court of Appeals for the Ninth Circuit. J. C. Will Jorgensen, Plaintiff in Error, vs. County of Tuolumne, etc., Defendant in Error. Order Enlarging Time to File Record and to Docket Cause. Filed March 19, 1912. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk. Refiled Mar. 27, 1912. F. D. Monckton, Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

J. C. WILL JORGENSEN,
Plaintiff in Error,
vs.
COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

No. 2121

BRIEF OF PLAINTIFF IN ERROR.

This case is brought before this Court by writ of error to United States District Court of the Northern District of California, Second Division, for the purpose of reviewing an order and judgment of non-suit entered in said action by the former United States Circuit Court for the Ninth Circuit, Northern District of California.

STATEMENT OF THE CASE.

The action was brought to recover from the defendant the value of certain extra work done in the construction of a bridge spanning the Stanislaus River between the Counties of Tuolumne and

Calaveras, which bridge was erected under a contract made with defendant by Jorgensen Brothers, the assignors of plaintiff in error. The controversy grows out of the fact that the plans published by the County, and which formed a part of the contract, fixed and indicated that the mid-stream pier was 27 feet 6 inches from spring line of arch to bedrock, but when the plaintiff's assignors excavated for the pier it was found to be 51 feet 6 inches (24 feet additional) to bedrock, the contract requiring that all piers should be imbedded in bedrock.

The complaint contains two counts. In the first plaintiff counts on the general assumpsit, alleging the reasonable value of the work to have been Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

In the second count, plaintiff sets out the facts showing the execution of a contract between Jorgensen Brothers and the County of Tuolumne for the construction of a reinforced concrete bridge for the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars, according to certain plans, which provided for a bridge with a mid-stream pier of a definite and specified length and fixing and indicating the distance to bedrock in mid-stream where this pier was to rest, and an ignorance of the contractors as to the error in representation; the allegations going to the extent of alleging a warranty on the part of the County that the bedrock was at a certain depth beneath the

surface. It is then further alleged in this count that when the point indicated on the plans as bedrock was reached in sinking, that no bedrock was found, and that it was necessary to sink an additional distance of twenty-five feet and six inches (proven to have been twenty-four feet) at an additional cost of the said Seven Thousand Nine Hundred and Fifty-six and 63/100 (7,956.63) Dollars.

Defendant answered denying all liability for the extra work, and taking the position that the contract was entire, that plaintiff's assignors had stipulated in the contract that all the piers of the bridge should be firmly imbedded in bedrock, and the bridge completed for the contract price of Sixteen Thousand Seven Hundred and Seventy-five (16,775) Dollars.

The plaintiff's claim for the contract price had been paid by the County, but his claim for the extra work was rejected.

A jury was impanelled to try the case, and at the close of plaintiff's testimony defendant moved for a non-suit upon the ground that plaintiff had shown by his testimony that the contract was an entirety.

The Court granted the non-suit, whereupon judgment of dismissal was entered. Hence this appeal.

FACTS.

The Stanislaus River has its source in the Sierra Nevada Mountains, flows westerly into the San Joaquin and becomes the natural boundary be

tween the County of Tuolumne and its northern neighbor, the County of Calaveras.

It appeared in the evidence introduced, going to make up the plaintiff's case, that prior to the 8th day of September, 1908, the County of Tuolumne ordered the construction of a reinforced concrete bridge over the Stanislaus River at Melones (Robinson's Ferry), a point near the western boundary of the two counties, and at a point where the river in the wet season of the year is about two hundred feet wide.

In pursuance of this order, the Board of Supervisors published a notice to contractors asking for bids for the construction of the bridge "as per plans and specifications for the same prepared by N. J. Pickle, County Surveyor," and adopted by the Board of Supervisors of Tuolumne County.

In response to this notice, plaintiff's assignors made a written bid in which they proposed to furnish all the necessary labor, material, scaffolding, etc., for the bridge for the owners according to plans and specifications by Mr. Pickle, County Surveyor, in consideration of the sum of Sixteen Thousand Seven Hundred and Seventy-five (16,775) dollars.

The plans referred to consisted of six sheets which were admitted in evidence and marked 1 to 6, respectively.

Exhibit 5 is a drawing of the proposed bridge, looking down stream, Calaveras County being on the right and Tuluomne on the left. All the plans

were drawn to scale and this drawing of the bridge represents a total roadway of 349 feet with 2 main spans of 118 feet each. The drawing also plans for four piers, two on the shore on the Calaveras County side, one on the shore on the Tuolumne County side, and one in mid-stream. The drawing also indicates the surface of the water, with a statement "Present water June 6, 1908," and also just below the water line is another statement "Low water." It also indicates the line of bedrock, with the gravel in the bed of the river resting on the bedrock, and with the water above it, and also represents the center pier imbedded in bedrock. On the left hand side of the drawing appears the scale indicating the height of the bridge, and the base of the pier in bedrock as being 27 feet 6 inches below the spring line of the arch. On each side of the plan the bank of the stream is represented, indicating the bedrock as it really exists, and as it appeared to the bidder before making his bid.

Exhibit 3 is a profile and indicates similar details.

Exhibit 6 is a plan of the details of the proposed bridge, and this drawing gives a plan of the parts of the bridge with dimensions, and indicates and fixes the size of the mid-stream pier, giving its height from base to spring line of arch, and from spring line to floor of the bridge, the distance from spring line of arch to the base of the pier at bedrock being represented on this plan by numerals as being 27 feet and 6 inches.

The contract executed between defendant and plaintiff's assignors contained appropriate recitals,

and then provides that "In consideration of the premises, and a further consideration of the sum of $16,775.00, to be paid by the party of the first part, as hereinafter expressed and provided, the parties of the second part * * * promise and agree with said party of the first part that they will honestly and faithfully perform the work herein referred to * * * ." That "the party of the first part covenants and agrees to pay, or cause to be paid to said parties of the second part during the progress of said work, and when the same shall have been completed and accepted as hereinafter provided, the sum of $16,775.00 * * * ." That the plans and specifications filed with the County Clerk shall constitute a part of this contract, and that "said construction, erection and work, shall be done and completed in a good and workmanlike manner, according to said plans and specifications."

The specifications referred to in the contract, so far as material here, were as follows:

> "The exact location of this bridge shall conform with the surrounding conditions as shown by the accompanying map, plans, section and profile which are all made a part hereof.
>
> The height shall conform to the official grade of the proposed fills as shown in the accompanying profile.
>
> The dimensions of this reinforced bridge shall be as shown on plans accompanying this specification. It shall be constructed to support with safety, at least a live load of twenty tons concentrated on any sixteen square feet of deck.

* * * Contractors are requested to view the proposed work on the ground and judge of its nature and character before presenting bids.

Foundations are to be constructed substantially as shown on plans. The footings of piers, abutments and wing walls will be thoroughly embedded in the bedrock. It is assumed that the bedrock on each side of the river will be found at a depth shown on plans. Should it be determined that it is necessary to go to a greater depth than this to reach bedrock this work shall be done by the contractor without additional expense to either County. In any event the contractor is to do all necessary excavation.

Any drawings or plans that may be listed in these specifications shall, together with the specifications, be regarded as forming a part of the contract. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications must be done as though shown or mentioned in both.

These specifications and the accompanying map, plans and profile are intended to co-operate and explain each other and to provide a complete structure."

J. C. Will Jorgensen, the contracting brother who presented the bid, visited the ground in accordance with the direction of the specifications, and testified that he found that "it compared pretty fairly with the nature of the ground, the conformation of the ground, the presence of bedrock, as

compared with the sheet marked 'Details of proposed bridge,' " and that it gave him the impression that the profile he received "was made according to the natural conditions." (Tr., pp. 82 to 88, inclusive.)

That the portion of the pier of the river where the mid-stream pier was to be located was covered with water.

From the deposition of H. H. Will Jorgensen it appears that he was in charge of the excavation for the foundation of the mid-stream pier. That the excavations were carried on with a coffer-dam. That when they reached the point marked bedrock on the plans, bedrock was not found and they continued their excavations downward. (The pleadings admit that N. J. Pickle, County Surveyor of the County of Tuolumne, was Superintendent of the defendant, in charge of the work.) That about the time that further excavation downward was continued, the witness had a conversation with Mr. Pickle. "He (Mr. Pickle) said we had to get to bedrock to get a solid foundation. He requested us to get down to bedrock and to continue our excavations." Bedrock was found at 24 feet below the depth indicated on the plans.

This witness further testified that "The fact that we had to continue our excavations downward an additional distance of 24 feet to bedrock increased the cost of the construction of the bridge in the sum of $7,956.63. This amount was the fair and reasonable value of the additional work."

The witness further testified "Mr. Pickle was notified when we reached bedrock. He satisfied him-

self that bedrock was reached. The Supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier."

It was admitted that it would not have been safe to have put the pier upon the gravel and boulders that were found there. (p. 94.)

SPECIFICATION OF ERROR.

Appellant assigned as errors:

1. That the lower Court erred in its decision granting defendant's motion for a non-suit.
2. That the Court erred in entering judgment in the action dismissing the action.
3. That the Court erred in ordering judgment for defendant for its costs.

These assignments are all comprehended within the specification that the Court erred in granting the non-suit.

The motion for non-suit was made under Rule 60 of the Rules of the United States Circuit Court for the Ninth Circuit, which provided that "The defendant in an action at law, tried either with or without a jury, may either at the close of the plaintiff's case or at the close of the case on both sides, move for a non-suit. The procedure on such motion shall be as follows: The defendant, or his counsel, shall state orally in open Court that he moves for a non-suit on certain grounds, which shall be stated specifically. Such a motion shall be deemed and treated as assuming for the purposes of the motion (but for such purposes only) the truth of whatever the evidence tends to prove, to wit, whatever a jury

might properly infer from it. If, upon the facts so assumed to be true as aforesaid, the Court shall be of opinion that the plaintiff has no case, the motion shall be granted and the action dismissed."

In determining the question as to whether or not plaintiff has made a case, it is the duty of the Court to take that view of the evidence most favorable to the party against whom the instruction is desired, and from that evidence and the inferences justifiable to be drawn therefrom, say whether there is any evidence which would reasonably justify a finding for that party.

Milwaukee Mechanics' Ins. Co. vs. Rhea & Son, 123 Fed. 9-12. (Opinion of Lurton, C. J.)

Mt. Adams vs. Lowery, 74 Fed. 463.

The above cases are cited by the Supreme Court of Nevada, opinion of Sweeney, Judge, in the case of Burch vs. Southern Pacific, 32 Nev. 125-134, where the Court say:

> "The rule has been well established in this and other courts, that in considering the granting or refusing of a motion for non-suit the Court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and every inference of fact that can be legitimately drawn therefrom, and give the plaintiff the benefit of all legal presumptions arising from the evidence and interpret the evidence most strongly against the defendant."

See also:

Goldstone vs. Merchants Ice etc. Co., 123 Cal. 625;

Hanley vs. California Bridge Co., 127 Cal. 232.

It is therefore apparent that if upon any theory of the law, when applied to the facts the evidence fairly tends to prove, plaintiff has a case, the Court will reverse the judgment and order a new trial of the action.

This will limit the discussion to the ground of non-suit that the contract was entire, and the conclusion drawn therefrom by defendant's counsel that under the contract plaintiff's assignors undertook to erect a mid-stream pier of indefinite dimensions with its footing imbedded in bedrock, regardless of the depth at which the bedrock might be found, in entire disregard of the representations made by the County and the circumstances under which the contract was made, insofar as those representations would tend to show that the minds of the contracting parties met only upon the construction of a bridge which should have its mid-stream pier imbedded in bedrock at a distance of not to exceed 27 feet 6 inches below the spring line of the arch, the spring line of the arch being an imaginary horizontal line drawn lengthwise the structure at a point where the arches rest upon the crown of the piers.

BRIEF.

It was never contemplated by the contracting parties that the extra work made necessary by the contract should be included within the contract price.

In making the contract, the minds of the parties met only upon the proposition made by the County, and accepted by plaintiff's assignors, that bedrock, at the point where the mid-stream pier of the bridge was to be imbedded, was 27 feet 6 inches below the spring line of the arch. There is no hint in the plans or specifications, nor in the circumstances surrounding the negotiations, that would tend to warn the bidder that bedrock at this point was or might be a distance of 24 feet lower in depth, which would thus increase the price of the bridge to more than $24,000, instead of the sum of $16,775, the price bid, nearly one-half more.

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting.

C. C. Cal., Sec. 1636.

The first and controlling rule of construction is to ascertain what was the intention of the parties at the time of the making of the contract.

Stockton Sav. & L. Soc. vs. Purvis, 112 Cal. 236-238.

In the case cited the Court held that title to personal property was in the person mentioned in the contract as the lessee, notwithstanding the express stipulation in the contract that the title to the property should remain in the person named in the contract as the lessor.

Courts, in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.

Nash vs. Towne, 5 Wall (U. S.), 689-704, 18 Law Ed. 527-529.

A contract may be explained by reference to the circumstances under which it was made.

Sec. 1647, C. C. Cal.

The subject matter of a contract may be shown by parole evidence of the surrounding circumstances.

U. S. vs. Peck, 102 U. S. 64, 26 Law Ed. 46.

In the case last cited the party was allowed to introduce the circumstances under which the contract was entered into for the purpose of showing that the conduct of the agents of the government led him to rely upon a particular means of fulfilling his contract until it was too late to perform it in any other way.

In the contract at bar the circumstances surrounding it, that is to say, the facts: that the bridge was to be built at a particular point and across a river which was a boundary of the County making the contract, and with the conditions of which it could be fairly assumed the officers of the County

were familiar; that bids were called for to build the bridge at this particular spot and in accordance with the plans and specifications which were made a part of the contract, and which were made by the Surveyor of the County making the proposal; that in the specifications the contractor was requested to "view the proposed work on the ground and judge of its nature and character before presenting bids; that a view of the proposed work on the ground and its nature and character so far as could be determined by *view,* agreed substantially with the plans and drawings set out; that the plans provided for a pier, its base hid in the water in mid-stream, the distance of which to bedrock could not be determined in any other way than by taking the representations of the plan, except at great expense, which expense was not contemplated by the proposal; that, according to the drawings and plans, the bedrock immediately under the mid-stream pier is positively and comparatively shown; that the mid-stream pier is shown by the plans and drawings with its base resting upon and imbedded in the bedrock; that the plans fix the height of the mid-stream pier from the spring line of the arch to bedrock according to a scale and in figures at 27 feet and 6 inches; that the same plan which fixes the height of the mid-stream pier fixes its width, its thickness, its shape and also the like dimensions of all other portions of the bridge; and, besides, that the drawing of the profile of the bridge indicates the depth of water, giving the date as "Present water, June 6, 1908", also indicates the point of low water and the depth of gravel beneath the water and on

the bedrock, all with painstaking exactness—all would tend to lead any ordinary mind into the belief that conditions were exactly as shown upon the plans. Especially would this belief arise in the mind of one who, in accordance with the instructions contained in the specification, viewed the proposed work on the ground and attempted to judge of its nature and character before presenting his bid, as was done by one of the contractors in the case at bar, and who (plaintiff) testified that he "concluded, with the line on both sides, with the natural profile of the ground on both sides, conforming so identical with the blue prints, and understood that there must have been some kind of soundings or some kind of evidence put up to the man who made the survey of the thing that would enable him to place the foundation of the center pier within, say an inch, or a couple of feet, or something like that, of the location he made," and that he "assumed it because of being on the ground and looking at it." (pp. 85-86.)

Similar instructions for personal examination of the location of the proposed work were construed in the case of Horgan vs. Mayor, 55 N. E. 204 (N. Y.). The contract in that case contained the provision that "bidders must satisfy themselves by personal examination of the location of the proposed work and by such other means as they may prefer as to the accuracy of the foregoing engineer's estimate." The contract was made with the City of New York to furnish and provide all necessary materials and labor and excavate, remove and dispose of all silt, sediment and other materials

deposited in the bottom of a pond in the city and to construct a concrete bottom over same. Subdivision 1 of the contract provided that the plaintiff should furnish "all labor and materials required for conducting the flow of water and draining off the water from the bottom during the prosecution of the work." The controversy arose over a claim for extra work for pumping out the pond, it appearing that when the contractor attempted to run the water out of the sewer, the sewer was blocked and failed to carry off the water. The plaintiff made a personal examination of the location of the proposed work as required, and on this feature of the controversy the Court say:

> "The question that lies at the threshold of this case is, did the city owe the duty to the plaintiff of having the outlet pipe of this pond in working order? The contention of the learned corporation counsel is that by the terms of this contract the plaintiff was bound, by his personal inspection of the location of the proposed work, and by Subdivisions 1, 2 and 5 of the specifications already quoted, to remove all the water in the pond, if necessary; in other words, that, if the outlet pipe had been so obstructed as not to draw any water from the pond, it was nevertheless incumbent upon the plaintiff to have removed it in some manner. We do not think this is a reasonable construction of the contract. It was, of course, impossible, when the plaintiff went upon the ground, to examine the proposed work to see more than the outlet gate, and the size thereof. Whether

the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises. A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water, in a general sense."

The case of Smith vs. Salt Lake City, 83 Fed. 785-787, is persuasive as to the position of plaintiff. In that case the city made a proposal for bids for the construction of an aqueduct and required the work to be done in accordance with plans and specifications, which plans were accompanied by instructions to bidders. A controversy then arose as to a recovery for extra work on account of the actual material necessary far exceeding the quantity specified, and in discussing the effect of the city inviting proposals according to plans and specifications, the Court say:

"A survey of the line of the proposed aqueduct and an estimate of quantities was essential to intelligent action in the premises. No bid could be made, nor could a contract for the work, without such survey and estimate. The city could have required bidders to make their own survey, but that course was not adopted. In a published notice the city invited proposals for building the aqueduct according to plans and specifications in the office of the City Engineer. Upon this notice plans and specifications were shown to bidders and it must be said that any attempt on the part of the city to limit their use is unavailing."

Further on in the case the Court discusses the presumptions arising from the survey as appeared by the plans and specifications, and then further said that it was not necessary to say that this presumption was conclusive.

The Court concluded (p. 787) that there was a material departure from the plans and specifications which resulted in a new and different undertaking upon which plaintiffs were entitled to recover the value of the work done by them in excess of the contract.

This construction of the contract in the light of the circumstances under which it was made, is emphasized by the opinion of Sanborn, Circuit Judge, speaking for the Court on the appeal in the same case.

See Salt Lake City vs. Smith, 104 Fed. 457, 462.

With reference to the contract in that case the Court say:

> "When they settled upon the terms of this agreement, they were considering a conduit laid in an open trench 6 or 8 feet deep, 'at such depth below the surface as will insure it against the effects of frost,' as the instructions to bidders read, over a comparatively level surface, requiring materials and work of about the quantities estimated by the engineer, and of a character necessary for the construction of such a work. This was the conduit described in the plans and specifications upon which the bid of the contractors and the contract itself were based, and this was the contract which

the parties contemplated, and upon which their minds met when they made their agreement. This plain fact limits every stipulation of the agreement, and in its light and in the light of reason every provision of this contract must be interpreted."

The purpose of publishing the proposal asking for bids on the bridge as per plans and specifications was to enable bidders to estimate the cost of the bridge, and the plans and specifications, and the details in the way of measurements, sizes, shapes, conformation of the ground, position of bedrock, depth of water, etc., were representations of material facts made by the County, and would naturally mislead as to price.

For additional authorities see:

Delafield vs. Town of Westfield, 28 N. Y. Supp. 443;
Langley vs. Rouss, 82 N. Y. Supp. 1085;
McKnight vs. Mayor of New York, 54 N. E. 661;
Wyandotte etc. Ry. Co. vs. Bridge Co., 100 Fed. 197-204;
Genoty vs. Mayor of New York, 63 N. E. 804;
Sexton vs. Chicago, 107 Ill., 332-333;
Becker vs. New York, 63 N. E. 298;
Chicago vs. Sexton, 2 N. E. 266-267;
Chicago vs. Duffy, 75 N. E. 912;
Cook County vs. Harms, 108 Ill., 158;
O'Neil vs. Milwaukee, 98 N. W. 965.

The only attempt made by the County to in any way qualify the exactness of the plans is in the statement that the depth of bedrock on *each side*

of the river is "assumed" to be as shown on plans and that should it be determined that it is necessary to go to a greater depth "than this" to reach bedrock, *this work* shall be done by the contractor without additional expense. Then follows the statement that in any event the contractor is to do all necessary excavation. Nothing, however, *is said* in the specifications about the bedrock in midstream, and had there been no representation at all as to bedrock in mid-stream, or if the plans had been drawn in such way as to show or to give a hint that bedrock in mid-stream was not known, probably from the statement that the bedrock on each side of the river was assumed to be at the depth shown could be gathered the intention of the County to inform the bidder that nothing at all was known about the bedrock in mid-stream, but such is not the situation. Where the bedrock is in plain sight and easily ascertained, they express a knowledge by assumption, but where it *afterwards* transpires that the depth is unknown, the bidder is left to the presumptions which must be drawn from a measurement made on the plans. He was asked to view the ground with the knowledge on the part of the County that a view of the ground would exhibit nothing but the sides and the surface of the water.

The length of the mid-stream pier to bedrock is as much a part of the "dimensions" of the bridge as any of it.

The rule that the hazard of an undertaking is assumed by the contractor and that he cannot recover for increased cost as extra work upon discovering that he has made a mistake in his estimate of the cost, or that the work is more difficult and ex-

pensive than he anticipated (30 A. & E. Ency. 1279) only applies to contracts such as the contract in Hennessey vs. Fleming Bros. (Col.), 90 Pac. Rep. 77, and other cases of like character cited by the defendant in the Court below, that is cases where the contractor makes a contract to complete a structure and no representation is made and the contractor is not misled as to material facts which enter into the estimate of cost, and which facts are as open to the inspection or knowledge of one contracting party as the other; but none of those cases in which this rule is invoked cover the case at bar. In this case one of the contracting parties assumed to know, and by its drawing and plans represented the exact location of bedrock, and in view of this representation secured the stipulation that *all* the piers should be imbedded in bedrock and the bridge completed for a certain price of $16,775—a price which the evidence creates no inference against as being largely disproportionate to the actual cost of the bridge. The facts clearly show that this stipulation enforces a loss of the amount claimed upon plaintiff, unless he has some remedy in this case. Surely if defendant had made the representation purposely and with the intention of misleading plaintiff's assignors into making an improvident contract, it would have been a fraud upon them and the action of deceit would lie. If so, is not the defendant liable where the same result follows from its act, although there is no evidence that it was intentional? Does not the situation give rise to the contract implied by the law to fit just such cases and to enforce payment on the theory of contract, be-

cause by reason of the contractor being misled it becomes the duty of the County to pay for the bridge that it actually got? There being no question in the case but what the bridge the County accepted was worth the amount demanded more than the bridge represented on the plans.

See:

Hertzog vs. Hertzog, 29 Pa. St. 468;

Sceva vs. True, 53 N. H. 630;

Trower vs. City and County of S. F., 157 Cal. 766;

Wyandotte vs. King Bridge Co., 100 Fed. 203, 204.

"Corporations, quite as much as an individual, are held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

Zabriskie vs. Cleveland R. R. Co., 23 How. 381, 16 Law Ed. 488.

No precise rule for determining when a contract is separable or entire can be given in all cases. It depends upon the intention of the parties.

See State vs. Jones, 21 Nev. 513.

In the case at bar, if the written contract alone is considered, aside from the circumstances under which it was made, and without construing it with the specifications, it must be conceded that the contract is entire insofar as on its face it demands the construction of the bridge for $16,775. But to thus state the proposition evades the question in the case. When the parties contracted for the construction

of the bridge, there was in the minds of the parties a bridge, with all of its parts pictured on a plan drawn to scale. It was a bridge of certain dimensions, its length was stated, its width was stated, and the same representation which warranted the length warranted the distance to bedrock of the midstream pier, or the length of that pier, whichever way it is put. Therefore it is not a question of whether or not the contract is entire, in that it requires the completion of the entire bridge as a condition precedent to its acceptance as a fulfilled contract, but has the defendant so conducted itself in representing the dimensions of the bridge that plaintiff's assignors were misled into bidding for and binding themselves to construct a bridge, which was not in contemplation at the time of contracting, at a cost far in excess of the contract price. It does not appear to be a contract where the contractor assumed a hazard. The conduct of the defendant represented a certainty and not a hazard, and upon that representation the bid was made. The conduct of the defendant would enable it to get a $24,000 bridge for $16,000, dealing in round numbers. Certainly its conduct in a sense estops it to dispute that the items are separable.

It is not always necessary that the misrepresentation be wilful. The effect upon the party is the same in either event.

See Seymour vs. Oelrichs, 156 Cal. 782, 796.

In the case last cited, the Court held the party estopped to assert the statute of frauds in a case where the conduct of the party himself misled the other party to his detriment. The Court say: "It

is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct, an actual intention to mislead is not essential," and quoting from the case of Anderson vs. Hubble, 93 Ind. 570, 576, "All that is meant in the expression that an estoppel must possess an element of fraud is, that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or *suffered* another to believe and take action upon." (Italics added.)

False representations may be by acts as well as words.

See Bigelow on Fraud, Sec. 467.

It seems fair to assert that when the county by its drawing, in effect, informed plaintiff's assignors that the dimensions of the mid-stream pier as to length were 27 feet 6 inches from spring line of arch to its base, and further represented it as imbedded in bedrock, thus inducing a contract with plaintiff's assignors for the construction of the bridge requiring them to imbed the piers in bedrock and complete the bridge for $16,775, that the minds of the parties did not meet upon the element of the hazard of constructing the bridge and completing it, regardless of where the bedrock existed, which would be necessary in order to maintain that the contract is entire as to the extra work, and that as to this extra work the minds of the parties never met; and inasmuch as the County accepted the bridge with a knowledge of all the facts, and its own superintendent insisted on the clause of the contract compelling the plaintiff's assignors to go

to bedrock, that defendant should be compelled to pay to the extent of the benefit it has thus received, under the same general rule of law which authorizes the recovery of money not justly due to the payee but paid by compulsion.

Trower vs. City and County, 157 Cal. 762, 767.

The fact that the falsity of the representation may not have been intended cuts no figure.

It has been stated as a familiar principle of law that where a party affirms either that which he knows to be false, or does not know to be error, to another's loss and his own gain, he is responsible for the injury.

Lobdell vs. Baker, 1 Metcalf, 193 (35 Am. Dec. 358)

citing as authority Adamson vs. Jarvis, 12 Moore, 241.

See Civil Code California, Sec. 1572, subd. 2; Mayor vs. Salazar, 84 Cal. 646.

This representation was not qualified by anything contained in the contract, plans or specifications, and the language of the contract "In any event the contractor is to do all necessary excavations" added nothing to the contract as a qualifying feature of the drawing. Particularly is this so when it is noted that in the context it immediately follows the stipulation "Should it be determined that it is necessary to go to a greater depth than *this* (the depth as shown on plans as to bedrock on each side of the river) to reach bedrock, *this work shall be done by the contractor without additional expense to either County.* Every expression and feature of the con-

tract is consistent with the idea and representation that bedrock under the stream is exactly as pictured on the drawing, Exhibit 5, and that the height of the pier from bedrock to top is as detailed in Exhibit 6.

In principle, the case of McConnell vs. Corona City Water Company, 149 Cal. 61, is on all fours with the case at bar. In that case the contract provided for the construction of a tunnel to completion, and that the tunnel should be timbered in a thoroughly workmanlike and practical manner so as to protect it from outward as well as inward pressure. The specifications provided that the tunnel should be constructed according to the specification of the engineers, and during the construction of the tunnel it was driven and timbered under the directions and specifications of the engineers of the defendant, and the defendant furnished the timbers. Thus it will be seen that the contract was entire. The tunnel caved during the construction and was repaired by the contractor. The action involved the repayment of the cost of the extra work. The point was made there, as here, that the contract was entire, that the contractor had bound himself to furnish a complete tunnel. To this the Court say:

> "If the question were whether the contract for the construction of this tunnel was entire and indivisible, there would be no hesitation in saying that it was. But this conclusion does not advance us in the determination of the real question in dispute between the parties. That question may be thus stated: Treating the con-

tract as entire, was the extra work necessitated by the caving of the tunnel, work within the contemplation of the contract, for which, therefore, the contractor was entitled to no remuneration, or was it work without the contemplation of the contract, for the doing of which he is entitled to compensation? To answer this question, in addition to the provisions of the contract, resort must be had to the evidence. First, as to the terms of the contract, it will be noted that while the contractor agrees to timber in a thoroughly workmanlike and practical manner, so as to protect against outward and also inward pressure, he is controlled in this by the further provisions that the tunnel is to be constructed according to the specifications of the engineers of the company in charge of the work, and that the material for timbering is to be furnished him by defendant. The evidence shows that the plaintiff did drive the tunnel and timber it under the directions and specifications of the supervising engineers of defendant; that progress payments were made upon the certificate of the engineers of the completion according to the terms of the contract of certain portions of the tunnel; that the contractor complained of the inferior quality of the timber which defendant persisted in delivering to him, and of the inadequacy of the timber work which the engineers directed should be done, all without avail; that he was obliged to use the inferior lumber which was furnished; and that the timbering was done

under the directions of and to the satisfaction of defendant's engineers. Under such circumstances, notwithstanding that the contract is indivisible, there can be no hesitation in saying that the contractor's responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell, that the responsibility for such accident must rest on the defendant, and that, notwithstanding that the contract was entire and indivisible, plaintiff was under no more compulsion to perform the extra work of repairing the cave in the tunnel so occurring than he would have been if it had been occasioned by a willful act of destruction upon the part of the defendant. The work became necessary to enable the contractor to proceed under his contract. It was occasioned by the failure of the defendant to furnish suitable timbers and by the mistake of their engineers as to the strength of the timbering required. As the contractor was doing his work under the directions and specifications of those engineers he cannot be held responsible for their errors or miscalculations."

It is apparent that under the facts of the case cited, the tunnel could not have been completed without repairing the cave, and the conduct of the defendant was largely responsible for the cave. Applying the case here, the furnishing of the extra work and material to construct the pier to bedrock a distance of 24 feet further than contemplated by

the contract was necessary in order to complete the bridge as provided for in the contract, and defendant was responsible for the fact that the estimate of cost did not cover this expenditure.

The discrepancy might easily have been 50 feet instead of 24 feet, and thus have more than doubled the cost of the bridge to the contractor. It surely could not have been contended that this was contemplated by the contract, and the result would have been so disastrous and shocking that surely a remedy would have been found other than the claim that this would have made the contract impossible of performance, which would have justified the plaintiff's assignors in abandoning the contract without forfeiting their bond.

It is respectfully submitted that the judgment should be reversed.

F. J. Solinsky,
Paul C. Morf,
Frank R. Wehe,

Attorneys for Plaintiff in Error.

CONTENTS.

No. 2121

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE (a municipal corporation of the State of California),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FURTHER STATEMENT OF CASE.

Section 1. Facts.

Before proceeding with the brief, we wish to add a short supplement to the statement of case made by plaintiff in error, in his brief. True enough, plaintiff in error testifies that he visited the site of the proposed bridge and that it "compared pretty favorably" with natural conditions. He further testified (Tr., p. 85) that he could see that the plans were "only an assumption as to the bedrock on the sides of the river"; nevertheless, he made no in-

quiry to determine whether or not the representation of the middle pier on the plans was not an assumption also; "I did not ask any one if they had made any soundings" (Tr., p. 86). The bill of exceptions shows likewise that plaintiff in error had before him the specifications when he made his bid, and had read the provisions requiring all piers and foundations to be constructed in bedrock (Tr., p. 84), and understood when he made the contract that the terms of the contract would require him to do so.

> "Q. You believed at the time that you made this bid that your contract required you to put all foundations to bedrock, did you not?
>
> A. Yes; it is a part of the engineer's judgment in forming an arch construction; you have to support all piers to an even bearing capacity, otherwise you would create uneven settlement and that would cause a cracking in the construction." (Tr., p. 87.)

It further appears from the testimony of H. H. Will Jorgensen, the partner who had charge of the work, that on the 25th day of October, 1908, while excavating, he reached the place where bedrock was marked upon the plans and failed to find the bedrock as represented; that he had a conversation with Mr. Pickle, the County Surveyor, who was supervising the work for the county, and that Mr. Pickle required him

> "to get to bedrock to get a solid foundation; he requested us to get down to bedrock and to continue our excavation." * * * "Mr. Pickle was notified when we reached bedrock. He satisfied himself that bedrock was reached. The

> supervisors were there and gave us permission to put the concrete in. To commence with the construction of the pier." (Tr., pp. 93, 94.)

The excavation below the point where bedrock was shown on the plans, was completed on December 17, 1908, and the construction of the pier was completed up to the point where bedrock was located on the plans, on the 21st or 22nd of December, 1908 (Tr., p. 99).

When requested to proceed with the work in controversy, so far as the record shows, plaintiff in error and his partner never claimed that this work was not required by their contract, or was not included within its terms, or that they regarded it as extra work for which they would expect extra compensation. The record further shows that plaintiff in error and his partner put in claims for extra work from time to time during the construction of the bridge (Tr., p. 96), but the claim here involved was never made or presented until after the bridge was completed, on February 4, 1910, more than a year after the work in controversy had been performed (Tr., pp. 77-80), and after the payment of the first installment, which became due when the first half of the bridge was completed (Tr., pp. 62, 63). In the sworn claim it was admitted that the demand sued on here was more than a year old when presented to the Board of Supervisors, by making claim for a year's interest (Tr., p. 78).

BRIEF.

Section 2. Introductory.

Although the brief of plaintiff in error is written for the most part upon the theory that the work and materials sued for are outside the scope and terms of the contract involved, it is not confined to that theory but treats the case as though it was one for breach of warranty, or for damages caused by material misrepresentation in making the contract. The case cannot be both. It must be one or the other, because a warranty or misrepresentation is not a part of the undertaking imposed by the contract, but is wholly collateral to it and therefore cannot define its scope or terms. If the work done is within the scope of the contract, the case must be for breach of warranty or tort for fraud and deceit, if anything. If, on the other hand, the work sued for is not called for by the terms of the contract, there can be no breach of warranty or misrepresentation. The warranty or misrepresentation claimed is, that the plans showed all the work required under the contract. If, therefore, the work sued for is outside the contract, that representation or warranty is true and there is consequently no breach. In that event, the case must be upon implied contract, if anything.

From this brief statement it can be readily seen that it will be our purpose, in the first place, to show that the contract involved, which is admitted to be an entirety, requiring the delivery of a com-

pleted structure, was sufficiently broad in its scope and terms to include the work and materials here sued for, so that payment of the contract price constituted payment for such work and labor; that such work and labor was within the contemplation of the parties under a fair construction of the contract, which must be construed in favor of the defendant county in case of doubt, and further that such work and materials were treated as within the scope of the contract by the parties in the course of performance, and that this practical construction put upon it by the parties will be followed by the court. We will also endeavor to establish the proposition that if the work and materials were within the terms of the contract, plaintiff in error cannot recover at all, for the reason that in order to succeed he would have to establish either a breach of warranty or a case of fraud; that the case made does not establish a warranty because the representations in the plans are matters of description and not of warranty, under a fair construction of the contract, and that there can be no cause of action for fraud because a county is not subject to such an action, and for the further reason that even if the representations in the plans could constitute a warranty or a fraud as to the location of the bedrock, the cause of action arose and was barred by the statute of limitations before the claim was presented to the Board of Supervisors. And finally, it will be our purpose to show that even if the work and materials involved here were outside the contract,

still there is no cause of action because, under the positive prohibitions of our statutes there can be no implied contract against a county for work and materials of this kind; and, to conclude, even though an implied contract should be raised, in a case like this such contract arose and was barred by limitation before the claim thereon was presented to the Board of Supervisors.

Section 3. Labor and Materials Sued for Included Within and Required by the Terms of the Contract.

The first point to be determined in the decision of this case is whether or not, under a proper construction, the contract in suit bound plaintiff in error to perform the work and furnish the materials here involved. We do not believe it will be disputed that the contract in this case calls for a completed structure in consideration of a lump sum, for the contract expressly provides that its purpose is "to provide a complete structure", and that the bridge when completed "shall be constructed to " support with safety at least a live load of twenty " tons concentrated on any sixteen square feet of " deck". The question at issue is, whether the scope of these and other like general provisions of the contract and specifications is limited and controlled by the inaccurate representation on the plans showing the middle pier shorter than it really was.

It is clear from the express terms of the specifications that it does not. The specifications say: "Anything mentioned in the specifications and not "shown on the drawings, or shown on the drawings "and not mentioned in the specifications, must be "done as though shown or mentioned in both". In view of this provision can it be doubted that it was the intention of the parties that the drawings and specifications should only complement each other, and that in no sense of the word should one ever be so construed as to limit or restrict the other. The specifications required all piers to be of sufficient length to reach from the bridge to the bedrock. The bridge, to be a bridge and carry a load of twenty tons on any sixteen square feet of deck, must have piers for support and "the footings of "piers, abutments and wingwalls will be thoroughly "imbedded in bedrock". Can the failure of the drawings to represent correctly the distance to bedrock, so limit and control a bridge contract in this most fundamental respect, that it can be performed without the construction of complete and serviceable piers? We think not. Furthermore, the specifications expressly negative any intention on the part of the parties to the contract that the drawings or plans should be controlling on this point. It is provided: "Foundations are to be constructed sub- "stantially as shown on plans. The footings of "piers, abutments and wing-walls will be thorough- "ly imbedded in the bedrock. It is assumed that "the bedrock on each side of the river will be

" found at a depth shown on plans. Should it be " determined that it is necessary to go to a greater " depth than this to reach bedrock this work shall " be done by the contractor without additional ex- " pense to either county. In any event the con- " tractor is to do all necessary excavations." Foundations, which of course include the footings of piers, are not by the terms of the contract to be constructed according to the scale shown on the plans or drawings, but are to be "constructed *substantially* as shown on plans". This clause makes it clear that the scale of drawings on this point is not to be all controlling, but is merely descriptive or representative.

It is expressly stated in the specifications that as to those matters of which the county could be assumed to have knowledge, the plans were not accurately drawn so far as the bedrock is concerned: " It is assumed that the bedrock on each side of the " river will be found at a depth shown on plans". This quotation expressly negatives any inference that the plans correctly represent the bedrock at those places where its location could be accurately and conveniently ascertained. Having shown that it was not the purpose of the plans to represent accurately facts easily ascertained and probably within the knowledge of the parties, how then can it be assumed that it was the purpose of the plans or drawings to represent accurately the location of bedrock in the middle of the stream, when knowledge of this fact could not be ascertained except at

great expense? In other words, it could reasonably be assumed by the contractors here that the county had information in its possession as to the bedrock upon the sides of the stream where it was exposed to open view. Where such an inference could reasonably be drawn, the contract negatives by express terms any intention to represent it accurately, thinking of course, it seems to us, according to the true construction of this contract, that no one could ever assume that the county had gone to the expense of excavating in the middle of a stream covered by water, to determine definitely where the bedrock was located, merely for the purpose of accurately representing that fact upon the drawings.

Turning now to the authorities on this point, we have chosen a few cases similar to the one at bar in support of our contention. The case of

Stuart v. Cambridge, 125 Mass. 102,

deals with a state of facts practically identical with those at bar. Under a contract for a complete and entire structure, the specifications required the contractor to go to a firm and solid foundation. The plan showed a depth of fourteen inches. In the course of construction it became necessary to excavate much more than shown on the plan, and to use piles in support of the foundation. Upon this showing, the plaintiff there sought to recover for extra work, but his claim was denied by the highest court of Massachusetts, in the following language:

> "By the fair construction of this contract, the plaintiffs agreed to do all the work neces-

sary to drive piles in order to secure such foundation. The ruling of the Superior Court as to the construction of the contract was therefore correct.

"The evidence offered by the plaintiffs, that they made their estimate according to a plan made by the defendant's architect, showing a section of the wall which required only a depth of fourteen inches, and did not require any piles, and that it was customary for other persons engaged in the same business to make estimates in similar cases in the same manner, was incompetent, because it tended to control and vary the written contract."

To the same effect is the case of

Wear Bros. v. Schmeltzer, 92 Mo. App. 321.

The case of

Early v. O'Brien, 64 N. Y. Supp. (App. Div.) 848,

is a good illustration of how plans and drawings are controlled by the specifications. In that case the specifications provided that the walls should be of certain construction and that "great care must "be taken to render the walls perfectly water-" tight", but the drawings required that they be six inches thick, and it was there held:

"That the indication in the drawing of the proposed thickness of the floor was controlled by the provision of the specification, and that the contractor was bound to make the cellar water-tight even if it was necessary to make it thicker than six inches.

"Here was an express obligation to furnish a water-tight cellar, constructed of concrete or

> asphalt, and no inference to be drawn from the distance between two lines in a plan could relieve the plaintiff from the obligation to perform this express and explicit provision of the specification which he understood and upon which defendant's obligation was predicated."

So, in

Tharsis v. McElroy, L. R., 3 App. Cas. 1040 (House of Lords),

it was held that where contractors agreed to construct an iron building according to specifications and found that the girders could not be built in that way, and made them heavier, they were not entitled to recover for the difference as the fault of the specifications was no excuse.

Likewise in

Sharpe v. San Paulo R. Co., L. R., 8 Ch. App. 597,

it was decided that where contractors had agreed to build a railway for a lump sum they must do so, notwithstanding the specifications and estimates were erroneous and the amount of the earth required to be removed was largely in excess of that shown by the specifications, for the reason, said the court, that they took this chance when there was no fraud or willful miscalculation.

To the same effect, see:

Leavitt v. Dover, 67 N. H. 94; 68 Am. St. Rep. 640;

School Trustees v. Bennett, 27 N. J. L. 513;

Dermott v. Jones, 2 Wall. 1;
Scrivener v. Pask, L. R., 1 Com. Pl. Cas. 715;
Williams v. Fitzmaurice, 3 Hurlstone & Norman 843;
Hennessy v. Fleming Bros., 90 Pac. (Colorado) 77.

Section 4. Labor and Materials Within Scope of Contract as Construed by Parties.

As appears from the record in this case, when the contractors discovered the fact that the bedrock was not situated as delineated upon the drawings, after conversation with the superintendent in charge they were requested by him to continue excavation, and they complied with his request. It does not appear that any objection or intimation whatsoever was made that the construction work requested was not included within the terms of the contract. It also appears that the work in controversy here was done in the early stages of the contract, and that afterwards from time to time work outside the terms of the contract was performed, for which claims were presented and paid, and that the first payment under the contract was made after the work involved had been performed, but that no claim for this work was presented until after the bridge had been completed. These facts, we believe, show a practical construction of the contract by the parties which is binding on the court. If there can

be any doubt as to the correctness of our interpretation of the contract as above outlined, it is, we think, resolved in our favor by the conduct of the parties during the performance of the contract. As authority for this position we desire to quote

Wait on Engineering and Architectural Jurisprudence, Section 566 (p. 488),

as follows:

> "When a structure is being built for a fixed price, recovery cannot be had for extra work merely by proving that the work was done at the owner's request, and that it was accepted when finished; such a request has been held to be merely a notice that the contract called for the work. * * * If a contractor has undertaken to erect a structure according to plans, and agrees afterwards to changes, but makes no arrangements as to a new or different price, his recovery will be confined to the original contract price."

To the same effect is

Thorn v. Mayor etc. of London, L. R., 9 Exch. 163, 175,

where it is said:

> "I have great doubts whether this alteration which actually took place comes within the powers of variation contained in the contract. But the contractor did not raise this objection, but, as found by the case proceeded with the works in the new mode specified by the engineer. He seems to me to have sanctioned the work of the engineer in making the alteration, and it is now too late for him to say that it is a matter dehors the contract, and to require an

indemnity for the extra expense he has been put to."

Likewise, see, also:

Wait, Eng. & Archi. Jurisprudence, Sections 578, 579, 580, and cases there cited;

Simpson v. United States, 172 U. S., at p. 383.

Section 5. Contract Construed Favorably to County.

In determining the true construction of this contract it should also be borne in mind that one of the parties thereto is a county, and that under the express provisions of Section 1554 of the Civil Code of California, the contract is to be construed most strictly against the private party.

Section 6. No Cause of Action for Warranty.

If, as we believe, the labor and materials sued for were within the terms and scope of the contract in suit, plaintiff's action here, if any he have, must be on the ground of warranty or misrepresentation. We will therefore consider the case from this standpoint, to determine whether or not the representation complained of here constituted a warranty upon which plaintiff could rely and by which defendant would be bound.

It is a general principle of contract law that recitals by way of description do not constitute a warranty.

30 Am. & Eng. Ency., (2nd ed.) 148;
Randall v. Thornton, 68 Am. Dec. (Maine) 56.

This principle found specific application to building contracts in the case of

Hooper v. Welch, 8 N. W. (Minn.) 589,

where it was held, in a case dealing with a bridge contract, that the plans could not be treated as warranties of anything because "it was plaintiff's busi-" ness to ascertain before executing the contract " that it could be fulfilled according to the plans".

It is also held in

American Surety Co. v. San Antonio etc. Co., 98 S. W. (Texas) 387:

> "If there is no implied warranty by the architect to his principal that there are no such inherent defects in his plans * * * it would seem that no such warranty should be implied by the owner to one who, with the plans and specifications before him, with ample time to consider and determine what is to be done and can be done by them, obligates himself to do the work to completion."

To the same effect is

Thorn v. Mayor, L. R., 1 App. Cas. 120 (House of Lords),

where it is said:

> "But it is argued on behalf of plaintiff that from the contract itself a warranty may be

implied on the part of the defendants, that there are several distinct clauses in which the defendants expressly state that they will not guarantee certain things, and that upon the maxim *Expressio unius est exclusio alterius,* there is an implied warranty in every case which is not expressly excluded. This is certainly a novel application, if not a total change of the purpose of the maxim, for the plaintiff's argument really is that *Exclusio unius est expressio alterius,* that the exclusion of a warranty as to certain parts of the contract is an admission of a warranty as to the other parts. There is no principle upon which such a rule could exist; and certainly nothing approaching to it has ever been established."

See, also:

Simpson v. United States, 172 U. S. 372;
Bancroft v. San Francisco Tool Co., 120 Cal. 228.

Section 7. Action Barred by Section 4075, Political Code of California.

By the terms of Section 4075 of the Political Code of California, it is provided:

"The board of supervisors must not hear or consider any claim * * * nor shall the board credit or allow any claim * * * unless the same * * * is presented and filed with the clerk of the board within a year after the last item of the account accrued."

This section has been construed by our Supreme Court to include claims of all kinds whatsoever which may be urged against a county: See:

Farmers' etc. v. Los Angeles, 151 Cal. 655;
Rhoda v. Alameda County, 52 Cal. 350;
Alden v. County of Alameda, 43 Cal. 270;
McCann v. Sierra County, 7 Cal. 121.

If the cause of action stated here be treated as upon a warranty, the cause accrued when the contract was executed.

Jewitt v. Fisher et al., 58 Pac. (Kansas App.) 1023;
Bellamy v. Chambers, 69 N. W. (Nebraska) 770;
Merchants etc. Bank v. Spates, 56 Am. St. Rep. (W. Va.) 828;
Raynor v. Mintzer, 72 Cal. 585.

The contract was executed on the 8th day of September, 1908, more than a year prior to February 4, 1910, the date of making and presenting the claim here sued on. The mistake or alleged breach of warranty was actually discovered by the parties on October 25, 1908, and all damages sustained by the supposed breach had accrued on the 22nd day of December, 1908, when the construction below the point shown on the plans had been completed—all more than a year prior to the making and presenting of the claim sued on.

Section 8. No Claim for Breach of Warranty Presented to the County.

As appears from the authorities cited in the preceding section, no action can be maintained against a county unless the claim therefor has been presented to the Board of Supervisors and refused. An inspection of the record in this case reveals the fact that the claim presented and refused was one for extra work and labor, and not for damages for breach of a warranty. To the point that the cause of action sued on must be the identical cause presented to the Board of Supervisors, and that a variance in this respect is fatal, see:

Lichtenberg v. McGlynn, 105 Cal. 45;
Porter v. Fillebrown, 119 Cal. 235, at p. 238;
Brooks v. Lawson, 136 Cal. 10;
Dutard, Estate of, 147 Cal. 253.

It therefore follows that even if the facts would support a cause of action for breach of warranty in the first instance, this action cannot be maintained on the theory of warranty on account of the failure to present a claim of that nature to the county.

Section 9. No Action for Fraud, Misrepresentation or Tort Can be Maintained Against Defendant County.

It is well settled law in this jurisdiction that no cause of action for fraud or deceit, misrepresenta-

tion or other tort, can be maintained against a county, for the reason that a county is a mere subdivision of the state itself and cannot be sued unless permission to do so be given by legislative enactment, and on this point a county is to be distinguished from a municipal corporation or other public body voluntarily organized.

Sels v. Greene et al., 81 Fed. (C. C. N. D. Cal.) 555, and California cases there cited.

The same objections may also be made to the tort theory of the case, on the ground of bar by limitation and failure to present claim to the Board of Supervisors, as are made in Sections 7 and 8, supra, to an action for breach of warranty.

The foregoing argument and authorities concludes our discussion of the case upon the theory that the labor and materials sued for were covered by the terms of the contract. We have yet to determine whether or not the facts shown by the record are sufficient to entitle plaintiff in error to recover on the assumption that he was not compelled by the contract to perform the construction work in question.

Section 10. Implied Contract Cannot be Raised Against a County for Bridge Construction.

The theory upon which plaintiff seeks to raise an implied contract in this case for extra work and labor is, briefly stated, that the construction work

under discussion was not included within the scope of the contract; that the performance of such work was requested by the superintendent in charge and the Board of Supervisors at the time the work was done, and that the bridge was afterwards accepted and used by the county. That such a contract cannot be raised by implication is made plain by the terms of Section 4073 of the California Political Code, which reads as follows:

> "Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge, or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified, in writing, and the cost thereof agreed upon between the board and the contractor. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure."

This section speaks for itself, but out of extreme caution we desire to cite, in addition thereto, Sections 2713, 4005 and 4072 of the California Political Code, as lending further strength to the plain provisions of the section quoted.

In connection with this feature of the case, we desire to cite the following authorities as conclusive

of the proposition that no contract can be implied contrary to the express provisions of the statute:

Richardson v. County of Grant, 27 Fed. (Circuit Court, Dist. Indiana) 495;
Zottman v. San Francisco, 20 Cal. 96;
Schmeltzer v. Miller, 125 Cal. 41;
Addis v. Pittsburg, 85 Pa. St. 379;
Murphy v. City of Albina, 29 Pac. (Oregon) 353;
O'Brien v. Mayor, 139 N. Y. 542 (592, 594).

Section 11. Neither Request Nor Acceptance of Benefits Sufficient to Bind County.

Neither the request of the County Surveyor, acting as superintendent of construction in this case, nor the consent of Supervisors permitting such construction, can constitute the basis of a valid contract against the county, for the reason that such officers were not clothed with the authority to make such a request or to give such consent.

Addis v. Pittsburg, 85 Pa. St. 379;
Murphy v. City of Albina, 29 Pac. (Oregon) 353.

It has also been frequently held that the use of a structure by a county or other municipality, in the absence of a valid request does not constitute

such an acceptance of benefits as will raise an implied contract.

Zottman v. San Francisco, 20 Cal. 96, 107;
U. S. v. Pacific R. R., 120 U. S. 227, 240;
Davis v. School District, 24 Maine 349-50;
Moyle v. Congregational Society, 50 Pac. (Utah) 806-9;
Murphy v. City of Albina, 29 Pac. (Oregon) 353.

Section 12. Claim on Implied Contract Barred by Limitation.

Even if there could have arisen in this case an implied contract for the construction work in question, such claim was barred by Section 4075, California Political Code, before presentation to the Board of Supervisors. The cause of action on implied contract arose, if at all, when the County Surveyor requested the work to be performed and the Supervisors gave their consent to its performance and pursuant to such request and consent the contractors completed such performance. All these acts occurred and were finished not later than December 22, 1908. The claim sued on was not presented until February 4, 1910, after the time limited by Section 4075 of the Political Code had expired.

We therefore conclude that upon the reasoning and authority herein set forth, the judgment of the lower court should be sustained.

Respectfully submitted.

J. C. Campbell,
Walter Shelton,
Attorneys for Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR BY ROWAN HARDIN, DISTRICT ATTORNEY OF THE COUNTY OF TUOLUMNE.

Counsel for plaintiffs in their brief lay great stress upon that provision of the contract reading as follows:

"It is assumed that the bed rock on either side " of the river will be found at a depth shown on " plans", without reference whatever to the middle pier and argue that as no reference was made to the middle pier in that statement, that it was a warranty or express representation by the county that bed rock was exactly as shown on the plans and would be found at no greater depth.

Plaintiffs were on the ground prior to entering into the contract and were well acquainted with the surrounding conditions and nature of the country where the bridge was to be erected, and the evidence shows that the bed rock could be seen or could be ascertained on the sides of the river, but that it could not be seen and could not be determined for a fact without actual excavation in the center of the river and this plaintiffs well knew had not been done.

Consequently where the specifications would only assume that bed rock could be found on the sides of the river, it would appear strange that said specifications would or could be construed to warrant or represent as a fact that bed rock could be

found at a point in the middle of the river where actual excavation alone could determine where the bed rock was.

There could be no logical conclusion from such a statement in the specifications other than a warning to the contractor that said specifications did not assume that bed rock could be found in the center of the river as represented on the plans, and that the contractor must accept at his own peril the erection of the piers of that bridge.

It does not seem within common reason that a county would only assume something as a fact which could be easily determined and at the same time and in the same instant warrant something as a fact which could not be readily or easily ascertained.

The interpretation placed upon that portion of the specifications by counsel for plaintiffs is both improbable and unreasonable.

A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties.

C. C., Sec. 1643.

When we look into the intent and object of the contract in this action there is nothing uncertain or complicated about it. The intent and object is to erect said bridge, the abutments and wing walls of which to be thoroughly imbedded in the rock for a sum of $16,775.00 and the contract to do this is

lawful, operative, definite, reasonable, and capable of being carried into effect without violating the intention of the parties.

To interpret the contract in the manner by counsel for plaintiffs would have the effect of making a definite and reasonable contract, indefinite and unreasonable, for such an interpretation would lead to construing the terms of the contract in one instance to the effect that the contractor was compelled to go to bed rock wherever found, and in the other instance that he would not have to go deeper for bed rock at the center pier than the point shown upon the plans, which construction or interpretation would leave the contract indefinite and in such condition that it would not be carried into effect, for if the contractors were not compelled by the contract to go deeper at the center pier than the point shown upon the plans, they could have stopped at that point and the intent and object of the contract would have been defeated.

Particular clauses of the contract are subordinate to its general intent.

C. C., Sec. 650.

Consequently in construing the wording of the specifications relied upon by the counsel for plaintiffs the wording of that clause is explained and governed by the general intent of the contract, which is the erection of a bridge the piers of which are imbedded in bed rock for said sum of $16,775.00.

The evidence shows that the plaintiffs did a great deal of extra work on the bridge which was understood by all parties at the time it was done that it was extra work and as such extra work was completed, plaintiffs promptly put their bills into the county from time to time and were paid therefor.

No claim whatever was made to the county or its representatives at the time it was discovered that bed rock was not as shown in the plans, that the expense of going deeper than the plans showed was not within the contract and was not included in the price mentioned in the contract. All work on this pier upon which this action was commenced was completed in December, 1908, and no claim was presented to the Board for such work until February 4, 1910.

When the meaning of the language of a contract is doubtful the acts of the parties done under it affords one of the most reliable clues to the intentions of the parties.

Hill v. McKay, 94 Cal. 5.

Counsel for plaintiffs in their brief make plain the rules of law that a contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting and that a contract may be explained by referring to the circumstances under which it was made.

When we take the rules of law cited by counsel for plaintiffs together with the rule of law men-

tioned in the case of *Hill v. McKay,* above cited, and apply these rules to the facts established, we will see that prior to entering into the contract, the plaintiffs as such contractors go upon the ground and inspect all the conditions surrounding the erection of the Melones bridge and enter into a contract for construction of said bridge for a specified price without requiring or asking that they be relieved of cost in the event bed rock was not found at the point shown on the plans; after the construction of the bridge is commenced, they discover that bed rock was deeper at the center pier than shown on the plans and plaintiffs make no contention at that time that in going deeper to bed rock than the plans show would be outside of the contract, or that they would be entitled to extra compensation therefor. During the construction of the bridge various items of extra work are done for which plaintiffs promptly present their bill and receive their pay, and it is not until the bridge was finally completed and not until more than a year after the work was done that plaintiffs conceived the idea to present a claim for such extra work.

Consequently it is impossible to escape from the conclusion that plaintiffs understood at the time the contract was entered into and at the time the work was done upon the center pier that such work was part of the contract, included within the contract price and that they had no claim whatever for such work against the county.

If the intention of the parties had been otherwise, the claim for such extra work would have been presented immediately after the work was done, as the plaintiffs did with other claims they had for extra work.

The case of *McConnell v. Corona City Water Company,* 149 Cal., cited and relied upon by counsel, is clearly distinguishable from the present case, for in that case stress is laid upon the fact that the company in charge had to furnish the material for timbering a tunnel and furnished an inferior quality of timber for the construction and compelled the contractor to use such timber although the contractor objected to such timber.

In view of such a statement of facts, it can be readily seen that the contractor could not be held responsible for injury which was caused by defective material furnished to him by the company.

In the present cause no such question arises.

The evidence shows that all of the work for which this action was brought was fully completed on December 22, 1908 (Trans. p. 99).

The claim upon which this action was brought was not presented to the Board of Supervisors of the County of Tuolumne until the fourth day of February, 1910.

The Board of Supervisors are absolutely prohibited from hearing or considering any claim which is not presented and filed with the clerk of

the Board within a year after the last item of the account or claim accrued.

Pol. Code, Sec. 4075.

It will be observed that the bill presented by Jorgensen Bros. to the County of Tuolumne (Trans. pp. 77-78) plaintiffs ask for one year's interest on the claim from February 1, 1909, to February 1, 1910, showing from plaintiff's said claim that the last item of their claim accrued more than one year prior to the time said claim was presented and that under said Section 4075, Pol. Code, the Board of Supervisors are absolutely prohibited from considering the claim and that plaintiff's action thereon must necessarily fall.

The counsel in their brief practically admit the correctness of the rule in the case of *Hennessy v. Fleming Bros.* that the hazard of an undertaking is assumed by the contractor and that he can not recover for increased cost as extra work on discovering that he has made a mistake in his estimate of cost. They attempt to distinguish the present case from that rule by a claim that the representation as to bedrock was a fraudulent representation and that the law relative to recovering money furnished upon that fraudulent representation would apply.

Such a claim however can not well be made in view of the fact that the evidence clearly shows that the plaintiffs viewed and inspected the ground prior to entering into the contract and were familiar

with all conditions surrounding the erection of a bridge at the point designated in the plans.

It is a well settled principle of law that if the means and knowledge be at hand and equally available to both parties and they have in fact made an investigation they can not recover upon the grounds of a misrepresentation of fact.

Chamion v. Woods, 79 Cal. 17, 20;
Lee v. McClelland, 120 Cal. 147;
Oppenheimer v. Clunie, 142 Cal. 313;
Southern Development Co. v. Silva, 125 U. S. 247;
Chryster v. Canaday, 90 N. Y. 272, 279;
Pomeroy Eq. Juris. (2nd Ed.), Sec. 892.

A contractor assumes the hazard of placing the building on a proper foundation regardless of what the plans might show.

Connors v. U. S., 130 F. 609;
Geary v. City of New Haven, 55 A. 584;
Harrison Granite Co. v. Stevens, 125 N. W. 36;
Pol. Code, Sec. 4073.

A contractor can not recover for extra work caused by defect in the plans.

Leavitt v. Dover, 32 Atl. 156.

Where the contract was to build a sewer and to do all necessary excavation, held, that the fact that part of the excavation was through rock, did not

entitle plaintiffs to extra compensation though neither party contemplated that rock would be met.

McCauley v. City of Des Moines, 48 N. W. 1028;

Simon v. Launis, 99 Ky. Law Rep. 59.

Under a contract for excavation plaintiffs can not recover extra compensation for excavating to greater depth than they expected to, where the contract silent as to depth is for a certain price per cubic yard, and no notice was given that it would be increased on account of the greater depth.

Ambler v. Phillips, 19 Atl. 71;

Wilkin v. Ellensburgh Water Co., 24 Pacific 460.

(Where it is impossible to determine what are the rights of the parties to building contract, or whether work performed by the contractor came within or was in excess of the obligation of his contract, the presumption of law is that it was required by the contract.)

Crocker v. U. S., 21 Ct. Cl. 255.

Where a contractor fails to make any objection to any extra work or fails to include it in his monthly estimate of work and knowing at the time that such expense was incurred, he is estopped from afterward making such claim.

Winston Bros. v. Louisiana Cent. Co., 53 So. 367;

Rebekah Assembly I. O. O. F. v. Pulse, 92 N. E. 1045.

Where uncertainty exists in a contract between a public body and a private person, the uncertainty is presumed to have been caused by the private party.

C. C., Sec. 1654.

Existing law enters into and becomes a part of the contract.

Pignaz v. Burnett, 119 Cal. 160.

The plans and specifications and contract were never placed on record, by plaintiffs, which act renders the contract void.

Holland v. Wilson, 76 Cal. 434;
Burnett v. Glas, 154 Cal. 255;
Condon v. Donohue, 160 Cal. 749;
C. C. P., Sec. 1183.

Respectfully submitted,

ROWAN HARDIN,
District Attorney of the County of Tuolumne,
Attorney for Defendant in Error.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

J. C. WILL JORGENSEN, *Plaintiff in Error,* vs. COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California, *Defendant in Error.*	No. 2121

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

THE CONSTRUCTION PUT UPON THE CONTRACT BY DEFENDANT IN ERROR IS UNREASONABLE, AND UNFAIR TO PLAINTIFF, AND UTTERLY IGNORES SEVERAL ESSENTIAL STIPULATIONS OF THE CONTRACT.

The contract called not alone for the construction of a bridge for the price stipulated. It called for the construction of a bridge "of the dimensions shown on the plans." (Transcript pp. 67, 62 and 63.)

The construction of the contract for which defendant in error contends entirely ignores and

eliminates from the contract that provision of the contract, as well as the express representation in the plans relating to the dimensions of the center pier and the distance to bedrock at its base.

Under this construction the contract becomes unilateral throughout. Under it the contractors would have been bound to construct a bridge of any size, whatsoever. If the dimensions on the plans were not binding upon the defendant in respect to the dimensions of the midstream pier, they were not binding upon it in respect to the dimensions of any other part of the bridge shown on the plans.

Indeed, defendant in error argues that the scale of the drawings was descriptive only: (1) in connection with the piers on each side of the river and the depth to bedrock to be reached there; (2) in connection with the foundations and footings of all piers; and (3) in connection with the midstream pier and the depth to bedrock at its base. Now, bearing in mind that the depth to bedrock determines the height of the piers, and their height determines the other dimensions of the piers and to some extent of the entire bridge, in proportion, and that the excavation work, the foundations, and the piers are the principal and most expensive part of the whole work, it may be pertinent to ask what, if anything, was made certain or conclusive by the contract under the defendant's construction of it except the amount fixed by the contract at $16,775.00 as the price to be paid to the contractors?

The question is what was there in the contract, in the surrounding circumstances, in the situation

of the parties, in law or in reason to demand such a construction?

Defendant insists that the plaintiff's assignors should have inquired whether soundings had been made to ascertain the location and depth to bedrock in midstream, but it is more reasonable to contend that the location and depth to bedrock, and the dimensions of the pier, in midstream were concluded by the express showing and representations in that regard made in the plans and by the language of the specifications calling for a bridge of the dimensions shown on the plans in as much as nothing transpired between the parties to raise any question as to truth of the representations.

The pleadings admit that these plans and specifications were proposed and furnished by defendant to the contractors for the purpose of preparing and making their bids. (Paragraph VI of Complaint, and paragraph III of 2nd Amended Answer, Transcript, pp. 8, 31.)

"We are not authorized to assume the furnishing of these plans and specifications, and inviting of bids, were intended either to entrap the unwary, or as an idle and useless ceremony. But we must assume that they were intended in good faith for the purpose of intelligently and bona fide making a contract for the construction of the court house."

Cook Co. vs. Harms, 108 Ill. 158,
Smith vs. Salt Lake, 83 Fed. 786, 787-8.

It is apparent that the defendant county was desirous of obtaining an entire bid for the whole

work, and as low a bid as possible. For that purpose it had selected the exact site for the proposed bridge, had placed the piers and abuttments, and caused to be prepared plans and specifications giving the distances and dimensions of every single part, and defining the quantity, quality, extent, nature, and character of the proposed work down to the minutest detail. The manifest purpose of all this was to make certain, definite, and specific the work to be let, so that the defendant might have the advantage of intelligent and reasonable estimates and of selecting the lowest bidder.

It must be assumed that the defendant was willing to pay a fair price for what it wanted and got, and sought to make a fair contract.

Again the defendant merely required the contractors "to view the proposed work" and judge of its nature and character. They were not asked by defendant to satisfy themselves of the conditions under water. They went upon the ground and viewed the proposed work, and the appearances there were such as to lead them to believe that the plans were drawn substantially according to the fact. And the specifications did not ask them to assume the risk of going to a greater depth to bedrock in midstream, as they were required to do on the sides of the river. Because of these facts, the plaintiff testifies in substance, he concluded that the surveyor and draftsman who made the plans had actual knowledge of some kind as to the location of bedrock in the river. (Transcript, pp. 85-86.)

Those were the appearances, the situation of the parties, and the surrounding circumstances.

Plaintiff in error has shown that his assignors had a right to rely upon the express representations made in the plans regarding the depth to bedrock in midstream.

Langley v. Rouss, 82 N. Y. Supp. 1082, 1085,
Wyandotte etc. v. King Bridge Co., 100 Fed. 204,
Delafield v. Westfield, 28 N. Y. Supp. 443,
Horgan v. Mayor, 55 N. E. 205,

and other cases cited in the opening brief, p. 21.

"The plaintiff was entitled to rely on the representation quoted as to depth of the foundations on north property, and to regard any work as extra which might be rendered necessary by reason of the fact that the representation was incorrect."

Langley v. Rouss, 82 N. Y. Supp. 1085.

The representations here were a "warranty" as to the depth to bedrock in midstream.

Delafield v. Westfield, 28 N. Y. Supp. 443,

and generally the other cases cited in this and the opening brief.

Defendant in error argues in this connection that it would be strange for the county to insert the provision with reference to the bedrock on each side of the river (where it can be readily located), and omit such a provision as to bedrock in the middle of the river, unless the county contemplated that the other requirement in respect to the imbedding of the piers in bedrock was of controlling force, as contended herein by defendant in error.

Such a deduction or reasoning is neither logical nor convincing. Its fallacy lies in the fact that it is not a necessary, nor even a reasonable deduction, and that this line of argument is begging the very question. It would have been easy for the defendant to provide in the specifications that if bedrock at the midstream pier was not found at the depth shown on the plans the contractor would have to go to whatever depth might be required, without additional compensation. Such was the case in Stuart v. Cambridge, 125 Mass. 102, cited by defendant in error. And the fact that no such provision was made does not argue in favor of the contention of defendant in error. On the contrary. The defendant in error in this argument, assumes that the contractors were bound by reason of the provisions to go to bedrock in midstream at any depth, and then seeks to prove this assumption by itself. This argument, stated briefly, is simply this: It would have been strange if defendant in error had not meant to thus bind the contractors, and therefore the contractors were thus bound, by reason of said provision. A clear case of reasoning in a circle.

The provision against extra compensation in connection with the work on each side of the river really did not mean much to the parties. The bedrock there was considerably exposed to view (transcript, pp. 87-88), and subject to slight irregularities on the bottom could be figured on beforehand for all practical purposes. The plans there were substantially correct (Transcript, p. 88). To make such a provision for that particular work was practical

and economical in the end. And it was entirely in line with the manifest purpose of the defendant in error at the time to make the work to be let certain, definite, and specific, so that defendant might have the advantage of competitive bidding and of the lowest bid.

But that the defendant county would want to make the same kind of a contract in connection with the work on the pier in midstream, where, as it appeared later, the depth to bedrock was not known, is not at all probable, nor would it have been in line with its manifest purpose of certainty and economy. On the contrary, it would have been highly speculative, and might have entailed a waste of public funds. Because it might have resulted in a gain in this particular case is beside the point. IF THE PLANS AND SPECIFICATIONS HAD STATED THAT THE DEPTH TO BEDROCK THERE WAS UNKNOWN, and that the contractor would have to asume the risk, THE RESULT WOULD HAVE BEEN THAT ALL BIDS WOULD HAVE BEEN HIGHER. Every bidder would naturally seek to protect himself against loss in case bedrock should be at a lower depth. Supposing then that the defendant in error was satisfied, from the appearances upon the ground, that bedrock in the middle of the river would be found at the depth where it was shown on the plans, and was willing to take the risk which it now claims the contractors assumed, for the purpose of obtaining the lowest bid possible. Would that be so strange a thing for defendant to do? Or, supposing that the defendant in error could not tell anything about it, as it

alleges in its answer (page 31 of Transcript, folio 43); but was willing to definitely fix the depth of bedrock in the river as shown in the plans as a basis for a reasonable bid and a fair contract, rather than to submit to high and arbitrary estimates and bids which it would otherwise surely have to contend with. Would that be so strange for it to do? Or even, supposing that the county surveyor who prepared the plans and specifications was deceived by the appearances upon the ground, as was the plaintiff when he viewed the proposed work before making a bid, and was thereby induced to positively represent and indicate on the plans that bedrock at the midstream pier was at the depth of 27½ feet from the springline of the arch. He knew that such a representation was essential to an intelligent and fair estimate and bid. Would that be so strange?

What may seem strange to the defendant in error now, appears to be a very reasonable thing, if looked at in another light. One must look at the provisions in question from these different points of view, all of which could have readily suggested themselves to prospective bidders at the time.

It would, therefore, not only be NOT strange that the county should not have wanted to speculate or gamble on the depth to bedrock at the midstream pier, but it would have been a most reasonable thing to assume that the defendant deliberately made the conventional depth of 27½ feet, represented on the plans as a positive fact, the basis for the bids and for the contract.

And, hence, the absence from the specifications of a provision that the depth to bedrock at the midstream pier also was assumed, and that the contractor must take the risk there the same as on each side of the river, fails to argue in favor of the construction now placed on the contract by defendant in error. The absence of such language actually throws light and shows that the contract did NOT mean what it did NOT state, which is as it should be.

Now, when one looks back, one is apt to be blinded by the outcome to the actual conditions and the situation of the parties at that time. We now know that the plans were erroneous, and that bedrock in midstream was not reached except many feet below the depth shown on the plans. But the contractors did not know this when they were making their estimates. And, after all, the question in the case is not whether it was strange for the defendant to make such a contract, but did it in fact make it? And that depends to a large extent upon what the contractors had a right to rely upon.

We respectfully insist that the defendant in error is bound by its own language.

Section 1656 of the Civil Code of this State, relating to the rules of interpretation of contracts, provides:

> "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, *unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.*"

And section 1580 of the Civil Code provides:

> "Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases, defined by the chapter on interpretation, they are to be deemed so to agree without regard to the fact."

Now, the defendant saw fit to expressly mention the bedrock on each side of the river, and to provide in connection with it that the contractor must go to a greater depth than that shown on the plans without additional expense to either county, if necessary. And it excluded the midstream bedrock and pier from this provision. By force of the provisions of section 1656 C. C., above quoted, all work of the same class, in connection with the center pier and bedrock in the middle of the river, must therefore be deemed to be excluded.

The cases cited by defendant in error on pages 9-12 of its brief are all cases which in principle are linked with the case of Lentilhohn v. New York, 92 N. Y. Supp. 902, which defendant in error failed to cite but which states the distinguishing principle upon which we rely in this connection most clearly, as follows:

> "In those cases, and only those, I think, where there is an express representation in a plan or specifications inserted for the purpose of showing that something exists which will facilitate or render less expensive the performance of the work, a recovery may be had. (Citing) Langley v. Rauss, 82 N. Y. Supp. 1082; Horgan v. Mayor, 55 N. E. 204; Becker v. New York, 63 N. E. 301)."

All of the cases cited by defendant in error are to be distinguished from the case at bar upon the facts and on principle.

In Stuart v. Cambridge, 125 Mass. 102, the specifications contained this provision: "All basement walls will commence fourteen inches at least below the basement floor, *and as much deeper as necessary to guarantee a firm and solid foundation.*" This was a provision which clearly told the prospective bidder that the conditions underground were unknown and gave him fair warning. And it was upon this provision that the decision of the court was based.

In Wear Bros. v. Schmaltzer, 92 Mo. App. 321, the specifications provided: "All foundations to go down to the natural and undisturbed earth *and to extend deeper than shown on the drawings, if necessary to reach firm and solid foundation.*"

Early v. O'Brien, 64 N. Y. Supp. 848, itself in the opinion distinguishes that case from McKnight Mfc. Co. v. New York, 54 N. E. 661, upon which we rely to illustrate the principle here contented for by plaintiff in error. The facts in that case, as well as all the other cases cited on this point by defendant in error were such as to bring them clearly within the general rule which is, as stated in Hennessy v. Fleming Bros., 90 Pac. 78, that the hazards of the undertaking are assumed by the contractor, and he cannot recover for increased cost, as extra work, upon discovering that he has made a mistake in his estimate, or that the work is more difficult or expensive than he anticipated.

Here, however, there was an express representation in the plans that bedrock in midstream was at a certain depth which was positively and definitely

shown. And this fact excepts the case from the operation of that rule.

II.

THE PLAINTIFF'S ASSIGNORS DID NOT WAIVE THIS CLAIM TO COMPENSATION OR DAMAGES BY CONTINUING WITH THEIR WORK WHEN THE ERROR ON THE PLANS WAS DISCOVERED.

Defendant in error claims that because the plaintiff's assignors did not make any claim for additional compensation or a new contract at the time when it was discovered that bedrock in midstream was not at the depth shown on the plans, they waived their claim to such compensation.

THIS PROPOSITION ASSUMES ERRONEOUSLY THAT THE PLAINTIFF IS SEEKING TO RECOVER EXTRA COMPENSATION UNDER THE CONTRACT.

The work in suit was new and additional work without which the bridge could not be completed in a safe condition (Transcript, p. 94). It was made necessary by unexpected physical conditions which had been erroneously indicated upon the plans. This action is to recover damages by reason thereof, on the theory of a constructive contract.

Hertzog v. Hertzog, 29 Pa. St. 468.

It was said in a case resembling the case at bar very closely in principle:

> "It is insisted on behalf of the city that the plaintiff, by obeying the orders of the engineers of construction, requiring him to take up and relay the alleged improper work, without making any claim for extra compensation at the time the changes were ordered or made, or with-

out making a new contract, has waived any claim, if he was entitled to any, to extra compensation. This proposition assumes erroneously that the plaintiff is seeking to recover extra compensation under the contract. This action is to recover damages for breach of the contract."

Gearty v. New York, 63 N. E. 807.

"The contention that where there is a breach of contract by one party, and the other thereafter is permitted to perform the same in part, receiving the contract price for such part performance, the injured party thereby waives or releases his right to damages for the breach, has no foundation in reason or authority. It is undoubtedly the rule that where one party to a contract breaks the same the other party may stop and refuse further performance. But, instead of doing so, he may perform as far as he is permitted and then claim the damages he suffers from the breach."

McMaster v. State, 15 N. E. Rep. 421-422.

"If there was a waiver on the part of the plaintiff, it must be made to appear in some way, and will not be presumed from the mere fact that he continued his work under his original contract after the unauthorized action of the board of public works in modifying and changing the same."

Markey v. Milwaukee, 45 N. W. 28, 30.

O'Neill v. Milwaukee, 98 N. W. 963, 966.

The admission in the pleadings in the case at bar is in substance that this work was "required" of the contractors by the defendant's agent under a claim that it was work within the terms of the contract. (Paragraph X of complaint, transcript pp. 14 and 15; and paragraph VII of amended answer, transcript pp. 53-54). The evidence also shows that there was a conversation about it between one of

the contractors and Mr. Pickle, said agent, in which the latter claimed that the contractors were bound to do this work under the contract. While it does not expressly appear what the contractor said during this conversation, it is perfectly clear that he complained about the error in the plans. (Transcript, p. 93.) He could not do more at the time. Either they would have to stop work, and sue for damages, or else complete the bridge as best they could, and then sue for damages. But they were not required to prefer a claim for extra compensation at the time, or to make a new contract.

Gearty v. Mayor, supra.

The New York Court of Appeals in this same case states the rule clearly, as follows:

> "It has been said that 'the doctrine of estoppel lies at the foundation of the law as to waiver.' Underwood v. Insurance Co., 57 N. Y. 505. In Rubber Co. v. Rothery, 107 N. Y. 310, 14 N. E. 269, 1 Am. St. Rep. 822, the doctrine of an equitable estoppel is discussed; and it is held, that to constitute it, 'the person sought to be estopped must do some act or make some admission with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim that he proposes now to make. The other party must have acted upon the strength of such admission or conduct. In cases of silence there must be not only the right, but the duty, to speak, before a failure to do so can estop the owner.' Page 316, 107 N. Y., and page 271, 14 N. E., 1 Am. St. Rep. 822. In Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548, Earl C. J., at page 447, 42 N. Y., 1 Am. Rep. 548, uses this language: 'Now, what is an equitable estoppel in pais, as generally understood and applied in

the courts? It is used to preclude a party from maintaining by evidence that which he has before expressly or tacitly denied, or disproving that which he has before expressly or tacitly admitted, when the other party has acted upon the faith of the admission or denial in such a manner that he will be injured unless the same is held conclusive.' See authorities there cited; also Boerum v. Schenck, 41 N. Y. 182."

Gearty v. Mayor, etc., of City of New York, 63 N. E. Rep. 807.

Here it appears that both parties probably were taken by surprise. It came at a time when a big part of the bridge had already been constructed, and there was no other way out of it except to do this work in order to complete the bridge. It could not be prevented then without losing the work already done (Transcript, pp. 93 and 94). The necessity for this additional work was an irrevocably accomplished fact or condition when it became apparent for the first time. The contractors were in a helpless situation. They either had to do this work, or place themselves into the position of defaulters under a contract with the county. This clearly is not a case wherein the doctrine of waiver can be applied.

In the case of Simpson v. United States, 172 U. S., cited by defendant in error, it seems that the change there made was authorized by the contract. The specifications prescribed two plans of constructing the work there in question, and the contractor had already proceeded under one of them, when the appearance of quicksand made it advisable to follow the other plan, and he was directed to do the work

over again. He did so, without any complaint, and asked for and was granted extensions of time, and finally upon completion and acceptance of the work he accepted payment under the contract, gave a receipt in full and made no claim or demand for extra compensation. Three years later an assignor of the contractor brought the action for extra compensation, and this was the first intimation to the government that the contractor claimed to have done extra work. (See page 378 of the report.) Clearly, that case is not a parallel case.

Again this defense was neither pleaded by the defendant, nor urged in the court below. It was not one of the grounds of the motion for non-suit. (Transcript, pp. 99-100.)

The plaintiff's assignors presented a claim for the work in controversy at the same time that they presented their claim for the balance due them under the contract, immediately upon the final completion of the bridge, and this action was commenced in March, 1910, or within a month after the completion of the bridge. (Transcript, pp. 97-98.)

III.

THE CAUSE OF ACTION ALLEGED IN THE COMPLAINT AND PROVED AT THE TRIAL DOES NOT INVOLVE A QUESTION OF THE SUITABLENESS OR SUFFICIENCY OF THE PLANS.

The second count of the complaint sets forth all the facts. It is not necessary to characterize the form of the action. It is alleged that the plans and specifications were furnished by defendant to the

contractors to make their estimates and bids and later to do the work by. That the plans positively and definitely fixed and indicated the depth and location of bedrock at the base of the midstream pier at 27½ feet below the spring line of the arch of the construction, and warranted and represented the same as a fact known to or ascertained by the maker of the plans, and so as to induce the belief, and that they did induce the belief, in plaintiff's assignors that the location and depth of bedrock at this place was known to defendant or its agents, and to be in fact as shown on the plans. It is further alleged that plaintiff's assignors made their estimates and bid, and entered into the contract solely under such belief and in reliance upon the representation and showing made in the plans, etc., etc. That the plans were erroneous in that regard, and negligently and carelessly made, drawn and filed, and in entire ignorance on the part of defendant or its county surveyor of the actual location of bedrock at said point; and that plaintiff's assignors at all times and until the error was actually discovered were in entire ignorance thereof. It is further alleged that bedrock at this point was not reached at the depth shown on the plans. That plaintiff's assignors were then required by defendant or its authorized agent to continue their excavations to bedrock, as required and prescribed by the specifications; that bedrock was not reached except at the additional depth of 25½ feet. That by reason of the facts, and the careless, wrongful, and negligent acts of defendant and its officers and agents,

the contractors were compelled to make these additional excavations and furnish additional work and material in the construction of the center pier, and put to great expense, and compelled to do this work at a largely increased cost by reason thereof; that said additional work, labor, and material was of the fair, reasonable, and necessary cost and expense to said contractors of more than $7,956.63; whereby and by reason of the facts alleged said contractors were injured and damaged in the sum of $7,956.63. (Transcript pp. 10-16.) The first count of the complaint alleges the same cause of action and is in the form of the common count.

The answer practically admits all these allegations, except so as to raise an issue upon the proper consturction of the contract.

Clearly, this is not a case of "insufficient or improper" plans, such as were involved in the cases cited by defendant in error on pages 15 and 16 of its brief, which follow the well known rule that in such cases the contractor agreeing to construct a building and deliver it complete assumes the risk of the sufficiency of the plans, and that the owner is not a warrantor of their sufficiency.

On the contrary the case at bar proceeds upon the theory that the defendant in error was bound to furnish correct plans and that it negligently made express representations which were erroneous, or else that it is estopped from questioning the correctness of the plans.

See:

Wyandotte etc. Co. v. King Bridge Co., 100 Fed. 204,

Smith v. Salt Lake, 83 Fed. 787-8,
Dalafield v. Westfield, 28 N. Y. Supp. 440, 443,
Langley v. Rauss, 82 N. Y. Supp. 1082, 1085,
Sexton v. Chicago, 107 Ill. 324, 327, 332, 333,
Sexton v. Chicago, 2 N. E. 265,
O'Neill v. Milwaukee, 98 N. W. 963, 966.

IV.

AN ACTION IN TORT MAY BE MAINTAINED AGAINST A COUNTY.

In opening and constructing highways and bridges a county does not exercise powers relating to the administration of general laws. It is only in cases of the latter class, where the county is made the compulsory agent of the state, that a county cannot be sued in tort. This distinction is clearly pointed out in the case of Sels v. Goune et al., 81 Fed. 555, 559, the only case cited on this point by defendant in error. The opinion in that case refers to Colman v. San Mateo, 75 Fed. 520, where it was held that a county may be sued in tort committed in connection with the opening of a road.

It is well settled that if a county or a municipal corporation, like a natural person, by its own act causes work to be done by a contractor to be more expensive than otherwise it would have been according to the terms of the original contract, it is liable for the increased cost.

Chicago v. Duffy, 75 N. E. 912, 913,
Horgan v. New York, 55 N. E. 204,
Backer v. New York, 63 N. E. 298, 301,

Gearty v. Mayor, 63 N. E. 804,
O'Neill v. Milwaukee, 98 N. W. 965, 966,
Messenger v. Buffalo, 21 N. Y. 197,
Brady v. New York, 30 N. E. 757,
Mullholland v. Mayor, 113 N. Y. 631,
Wyandotte v. Bridge Co., 100 Fed. 197,
Burns v. Casey, 109 Pac. 94, 97, 100, 101,
St. Charles v. Stockey, 154 Fed. 772,
Smith v. Salt Lake, 83 Fed. 784,
Cook County v. Harms, 108 Ill. 158.

V.

THE OBLIGATION OR LIABILITY OF THE DEFENDANT COUNTY IS ONE WHICH THE LAW CASTS UPON IT.

Section 4073 of the Political Code of this State, relied upon by defendant in error (pp. 19-21 of its brief), does not apply to the case at bar.

The first part of that section deals with voluntary changes and alterations of contracts. Clearly, that part of the section does not fit this case.

The concluding paragraph of the section relates only to extra work or extra compensation for work within the terms of the contract.

The work in suit was new and additional work, and outside of the contract. It was additional work required by the wrong location of the midstream pier and bedrock, which were located by the engineers of the county. The obligation to pay for this work arises from the law.

Wyandotte etc. v. Bridge Co., 100 Fed. 203-204, 205- 206,
Salt Lake v. Smith, 104 Fed. 466, 467,

Cook Co. v. Harms, 108 Ill. 158,
Langley v. Rauss, 82 N. Y. Supp. 1085,
Sexton v. Chicago, 107 Ill. 327,
Chicago etc. R. R. Co. v. Vosburgh, 45 Ill. 315,
Cunningham v. Baptist Church, 28 Atl. 490,
Chicago v. Sexton, 2 N. E. 265, 266-7,
Messenger v. Buffalo, 21 N. Y. 197,
Dwyer v. New York, 79 N. Y. Supp. 17,
Gearty v. New York, 63 N. E. 804, and cases generally cited above,
15 Am. & Eng. Ency. Law, 2d Ed., page 1078,
Smith v. Maynihan, 44 Cal. 62,
Sections 1427, and sub. 2, 1428 C. C.,
Sections 25, and sub. 2, 26, C. C. P.

In any event, the work in question would be considered work necessary to save the contract, and outside of the limitations imposed by section 4073 of the Political Code.

Allen v. Rogers, 20 Mo. App. 290.

And the contract, if necessary, would be treated and read by the court as reformed by reason of a mistake.

McManus v. Philadelphia, 60 Atl. 1001.

In so far as section 4073, and sections 2713, 4005, and 4072 of the Political Code operate as a limitation upon the powers of the Board of Supervisors, they are entirely beside the case, this is an obligation which the law casts directly upon the county, independent of any contract. The contract in such case is a mere fiction of pleading and is a construc-

tive contract as distinguished from an implied contract. (Hertzog v. Hertzog, 29 Pa. St. 468.)

Moreover, the sections of the Political Code relied upon by defendant in error do not apply to bridges over streams dividing two counties. With respect to such bridges the powers of the Board of Supervisors are plenary, and it may determine in each particular case the mode, as well as the extent of the exercise of such powers.

Croley v. Cal. Pac. R. R. Co., 134 Cal. 561,
Sacramento Co. v. S. P. Co., 127 Cal. 221,
Pool v. Simmons, 134 Cal. 623,
People v. Craycroft, 111 Cal. 544.

All the cases cited on this point by defendant in error on pages 21 and 22 of their brief are instances of limited powers circumscribed in the extent as well as by the mode of their exercise. Counsel for defendant argued upon the oral argument that section 4073 Pol. C. was enacted after the decision in the Croley case, and that it neutralized that decision in so far as this case is concerned. But as to this he was in error. The County Government Act of 1897, p. 470, sec. 38, contained the same provisions which have since been embodied in section 4073 of the Political Code.

Again, the bridge was completed and ready for delivery about the 1st of February, 1910. Page 98. These facts were admitted to be true.

The bridge was accepted on the 1st of February. (Page 97.)

The claim was filed and presented to the Board of Supervisors on February 4th and rejected on

February 23rd. (Page 77. Resolutions pages 73, 74 and 75.)

It is clear that in this state a county can become liable on an implied contract.

In San Francisco Gas Company vs. San Francisco, 9 Cal. 453, Judge Field said: "Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases and the implication extends equally against corporations."

This is as well established by the authorities as any principle of law can be.

This doctrine is approved in the case of Contra Costa Water Co. vs. Breed, 139 Cal. 432-438, and the case of Zottman vs. San Francisco, 20 Cal. 96, relied upon by defendant in error, to sustain the proposition that an implied contract cannot be raised against a county, is distinguished. See page 438. It will be noticed that in the Zottman case, the Court held that the City Council had absolutely no authority to make the alleged contract on account of "restrictions imposed by the charter" upon their powers, and the test of whether or not an implied contract can be raised against a county just the same as against an individual would seem to be whether or not the act upon which the implied contract is based would be within the power of the

governing board under any conceivable circumstances, that is to say, if the Board under no circumstances could make the contract, then under no circumstances would it be implied; but if the contract was within the power of the board, and it is only a question of whether or not the Board properly exercised the power, then the contract can be implied, and after accepting the benefit of the expenditure justified by the act of the Board, the Board is then estopped to deny that it authorized the expenditure. This is clearly the result of the authorities. See County of Sacramento vs. Southern Pacific Company, 127 Cal. 217, and Hitchcock vs. Galveston, 96 U. S. 341. Also note to case of Flowers vs. Logan County, 137 Am. St. Rep. 347-354. This note collects the authorities, and it is apparent that the doctrine is founded upon the rule announced by the U. S. Supreme Court in the case cited in the opening of plaintiff in error, viz: Zabriskie vs. Cleveland R. R. Co., 23 How. 381.

This doctrine of estoppel is clearly announced in the case of Seymour vs. Oelrichs, 156 Cal. 782, also cited in the opening.

VI.

THE PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY SECTION 4075 POL. C.

The plaintiff's assignors did present a claim for the work in suit immediately upon the completion and acceptance of the bridge. Until then they had no right to demand payment from the county. If they had abandoned their contract after doing all

or any portion of this additional work they could not have demanded payment from the county. Furthermore, their contract being entire, they could not demand payment under their contract until completion of the work. Clearly, they could not demand payment for this additional work until they were entitled to payment for the work within the contract. The county might never have accepted the bridge. Granting that all this additional work was very satisfactory, and that the liability of the county accrued upon its completion, yet the claim for the same would not become due and payable until the entire bridge was finished according to contract. Until then the obligation of the county to pay for this additional work was clearly contingent upon the final completion of the bridge according to contract.

See generally:

Am. Ins. Co. v. San Antonio etc. Co., 98 S. W. 400,

Chicago v. Sexton, 2 N. E. 264,

Cody v. City of New York, 75 N. Y. Supp. 648, 653.

It is respectfully submitted that this claim or demand did not "accrue" within the meaning of section 4075 Pol C. until final completion of the bridge according to contract.

The word "accrued" applied to a cause of action means to arrive, to commence, to come into existence, to become a present enforceable demand.

Eising vs. Andrews, 66 Conn. 58, 50 Am. St. Rep. 75.

"Accrues" means the time at which an enforceable legal right arises so that a suit might be brought thereon.

Rice vs. U. S., 122 U. S. 611 (30 Law Ed. 793).

But section 4075 Pol. C. does not at all cover the case of an unliquidated claim or demand against the county arising in tort and created by the general law alike governing counties as well as natural persons. A mere reading of said section and the sections following it is sufficient to show that the language and provisions therein contained would be very inapt if applied to a claim or demand like this.

But it is well settled that such language as is found in section 4075 Pol. C. does not apply to claims or demands of this character, and that no claim need be presented therefor at all before bringing suit.

Adams v. Modesto, 131 Cal. 501,
Strangler v. San Francisco, 84 Cal. 12, 20,
Bloom v. San Francisco, 64 Cal. 503,

Farmers, etc., Co. v. Los Angeles, 151 Cal. 655, cited by defendant, is based upon a provision in the city charter providing that all demands of every kind against the city shall be presented, and that no action shall be commenced against the city in any case until after such presentation and rejection.

The peculiar wording of this charter is distinguished and pointed out in Trower v. San Francisco, 157 Cal. 767-768.

The other cases, McCann v. Sierra County, 7 Cal.

121, Alden v. Alameda County, 43 Cal. 270, and Rhoda v. Alameda County, 52 Cal. 350, also cited by defendant in error, were all decided under old statutes materially different from the provisions of section 4075 Pol. C., and which are no longer in force.

A similar construction has been placed upon the language of the constitution, which forbids counties to "incur any indebtedness or liability in any manner" exceeding in any year the income provided for such year. It is uniformly held that this provision does not apply to liabilities which the law casts upon counties, irrespective of any contract expressed or implied.

McCracken v. San Francisco, 16 Cal. 631;
Lewis v. Widber, 99 Cal. 412;
White v. Franklin Bank, 22 Pick. 184;
Beach v. Fulton Bank, 7 Caw. 485;
Cook v. Ansonia, 66 Coun. 423, 34 Atl. 183;
McAleer v. Angell, 19 R. I. 892;
Little v. Portland, 37 Pac. 911, 914;
Thomas v. Burlington, 28 N. D. 480;
People v. May, 12 Pac. 838, 841;
Gubner v. McClellan, 115 N. Y. Supp. 755.

VII.

THE CONTRACT WAS NOT VOID BECAUSE NOT RECORDED.

The work in suit although made necessary by the contract is entirely outside of its terms. The contractors have been paid for the work performed

under it and if the contract had been void it would be too late now to question its validity.

But if the provisions of section 1183 C. C. P., relating to the recordation of contracts under the mechanics' lien law, at all apply to contracts with counties, the contract was nevertheless not void, but valid and binding as between the parties.

Stimson v. Brown, 136 Cal. 122, 125;

Laidlaw v. Marie, 133 Cal. 175-176.

At the hearing the attorney for defendant in error complained that the advocate for plaintiff in error had attempted to color his argument by the statement that the county had received a $24,000 bridge for $16,000, dealing in round numbers. The Court will see that there was a fair justification for the statement by reading the testimony of the witness H. H. Will Jorgensen on cross-examination on page 97, where it appears that the claim for the extra work is based upon its actual cost.

It is respectfully submitted that the judgment of the lower court should be reversed.

F. J. Solinsky,

Paul C. Morf,

Frank R. Wehe.

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE, a Municipal Corporation of the State of California,
Defendant in Error.

No. 2121

PETITION FOR A REHEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit, and to the Justices of said Court:

The plaintiff in error respectfully asks for a rehearing of this cause by this Court:

In the opinion on file herein it is held that the work in suit was extra and beyond the terms and requirements of the contract. But it is further held that section 4073 of the Political Code of this State covers this case; that the board of supervisors would not become liable to pay for said work except in the manner prescribed in that section; and that said statute is preclusive of the county's liability in the present case.

We respectfully suggest and insist that said section 4073 does not cover this case and is not at all applicable, and we confidently believe that this court upon a reconsideration of the case will so hold.

Section 4073 reads as follows:

> "Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge, or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified, in writing, and the cost thereof agreed upon between the board and the contractor. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure."

I.

THE REASONABLE INTERPRETATION OF SAID SECTION 4073 IS THAT THE SECTION HAS REFERENCE ONLY TO BRIDGES SITUATED ENTIRELY WITHIN THE LIMITS OF A COUNTY.

A bridge across a river dividing two counties is an entirety. In the nature of things it calls for unity of control.

In *Croley* vs. *Cal. Pac. R. R. Co.,* 134 Cal., 557,

the Supreme Court of this State held that subdivision 4 of section 25 of the county government act (Stats. 1891, p. 300, now sub. 4, sec. 4041 Pol. Code), giving the supervisors power to erect bridges, but providing that when the cost of erection of any bridge exceeds the sum of $500, the board must advertise for bids, etc., had no bearing upon the authority of the board to contract for the construction of a bridge crossing a stream which separated two counties. The court says:

> "As one-half of a bridge to be constructed over a river which is the boundary between two counties would be in each county, it is readily seen that its construction cannot be carried out under the provision of that subdivision. It is also evident that neither county would have the right to construct a bridge beyond its own boundary line, and there is no provision in the subdivision for any concert of action between the boards of the two counties, or for harmonizing any difference between them, if such should exist."

In another case the Supreme Court of this State construed a statute providing that all franchises should be sold to the highest bidder, including franchises to operate ferries and collect tolls, and held the same inapplicable to ferries between two counties, upon the same line of reasoning, using the following language:

> "In case the franchise should be sold to the highest bidder, which board of supervisors should

sell the same, and would the sale by the board of either county convey any franchise in the other county?, and in case each county should sell to different bidders, which one would be entitled to the franchises?"

Pool vs. *Simmons,* 134 Cal., 623.

The reasoning applies with equal force to section 4073 of the Political Code. There is no provision for concerted action between the two counties in said section.

This was emphasized in a very late case, construing subdivision 33 of section 4041 of the Political Code, in the following language:

"A bridge across a river dividing two counties is an entirety. In the nature of things it calls for unity of control. This is illustrated by the code sections authorizing the construction of toll bridges over waters dividing two counties (Pol. Code, Secs. 2843 *et seq.*). By these provisions the grant of the right to construct, the fixing of license taxes and tolls, and all details of regulation, are placed in the jurisdiction of the supervisors of the county on the left bank of the stream or other water. That no similar provision is found in the general enactment (Pol. Code, Sec. 4041, subd. 33) authorizing the grant of a right to take tolls upon a public highway, is persuasive evidence that the subdivision was not designated to include the case of a bridge over waters dividing two counties. It was certainly never contem-

plated that the board of supervisors of the county in which one-half of such bridge was located should have authority to grant a franchise to take tolls over such half, while the remainder of the bridge might be free and open. Here, as in the case of the construction of a new bridge (the case considered in *Croley* vs. *Cal. Pac. R. R. Co., supra*), there is no provision for concerted action between the two counties. The reasonable interpretation of subdivision 33 of section 4041 is that the section, if it covers the case of a bridge at all, has reference only to bridges situated entirely within the limits of a county."

Gardella vs. *Amador County,* decided January 20, 1913, California Decisions, January 28, 1913, Vol. 45, No. 2381, p. 116.

II.

UNDER THE DECISIONS OF THE SUPREME COURT OF THIS STATE THE BOARD OF SUPERVISORS HAS PLENARY POWERS IN SUCH A CASE.

The only statute in this State referring to the construction by counties of bridges crossing streams separating two counties is found in the concluding part of section 2713 of the Political Code, which provides:

"Bridges crossing the line between counties must be constructed by the counties into which such bridges reach; and each of the counties into which any such bridge reaches shall pay such portion of

the cost of such bridge as shall have been previously agreed upon by the board of supervisors of said counties.

"This provision is plenary in its terms. . . . As this section of the Political Code imposes this duty upon boards of supervisors, and confers upon them the power to perform the act, but does not prescribe the mode in which the power shall be exercised, such mode as well as the extent of its exercise is to be determined by the respective boards in each particular case."

Croley vs. *Cal. Pac. R. R. Co.,* 134 Cal., 561.

There has been no change in the law since that decision was rendered; and if section 4073 of the code had been enacted for the first time in 1897, as was claimed by counsel for respondent at the former hearing in this court, it would not alter the case, because the section does not apply to bridges between two counties. Nor does the fact, that said section 4073 is not in terms limited to bridges "within the county" affect the construction of said section. Subdivision 33 of section 4041 of the code, considered in *Gardella* vs. *Amador County, supra,* does not contain any such restrictive language and was nevertheless construed to refer only to bridges within one county. The absence of a provision in said section for concerted action between the two counties is persuasive evidence that the section was not designed to include the case of a bridge over waters dividing two counties.

III.

SECTION 4073 OF THE POLITICAL CODE BY ITS VERY TERMS AND LANGUAGE REFERS ONLY TO CHANGES AND ALTERATIONS OF THE WORK MENTIONED IN AND PROVIDED FOR BY THE CONTRACT.

This Court holds that the work and material in suit was not within the contemplation of the parties when they made the contract, was not within the terms of the contract, and was entirely outside of the contract.

In the opinion on file this work is called extra work. But we understand this Court to hold that it was not extra work within the meaning of that term as used in the concluding part of said section 4073, which provides that in no case shall the board pay or become liable to pay for extra work, etc.

Extra work, in that sense of the term, is work strictly incidental to the contract, and so intimately connected with it that it may be considered a part thereof.

But this work was new and different work and amounted to a new and different undertaking.

Smith vs. *Salt Lake,* 83 Fed., 787;
Smith vs. *Salt Lake,* 104 Fed., 466;
And authorities cited in briefs on file.

This Court so holds, and says:

> "For that work the board of supervisors would not become liable except in the manner prescribed in said section."

We respectfully insist that such new and different work is not within the terms and language of said section and is therefore not covered by it.

The headnote to the section is: "Contracts not to be altered, etc." This expresses the scope and purview of the section, and is of as much importance in the construction of the statute as is the text of the section.

> *Barnes* vs. *Jones,* 51 Cal., 306;
> *Sharon* vs. *Sharon,* 75 Cal., 16;
> *Dungan* vs. *Superior Ct.,* 149 Cal., 101-102.

Clearly, the section was designed to regulate the *alteration* of contracts, and not the *making* of contracts. The decision of this Court in this very case is that in order to bind the county, a new contract should have been made in the mode and manner prescribed by said section. Only, this Court seems to hold that if, for instance, the board of supervisors has once let a contract for any distinct part of a public improvement, the incurring of liability for another and different part of such public improvement is a change or alteration of a contract entered into by the board, within the meaning of section 4073 of the Po-

litical Code, and hence that such liability cannot be incurred at all except in the mode and manner prescribed in that section.

We have earnestly attempted to find the view point from which the section might be construed in that way. But we find that a contract for new and different work is neither within the letter nor the spirit of the statute under consideration.

The manifest object of the section is to limit, restrict and regulate the power of *ordering changes and alterations* in contract work by the counties, by placing such power exclusively into the hands of the boards of supervisors and prescribing the manner in which such boards should exercise the same.

But the section itself, in terms, refers only to changes and alterations of the contract "with the consent of the contractor." The Legislature must be presumed to have known that the terms of a contract cannot be changed or altered without the consent of all the parties to it. Yet it saw fit to expressly refer to the consent of the contractor. Unless, therefore, the words "with the consent of the contractor" are treated as mere surplusage, which we are not ordinarily allowed to do, the section must be construed and read as being applicable only to the ordering of changes and alterations of the contract, which without the consent of the contractor cannot be ordered by the board. Clearly, then, the changes and alterations by the board, which the section is designed to regulate,

must be changes and alterations of work provided for and mentioned in the contract. Since to such changes and alterations, and to none other, the consent of the contractor would be required, the board of supervisors would not need the consent of the contractor before ordering new and independent work entirely outside of the contract; and it is not reasonable to assume that the Legislature intended to make the consent of the contractor a condition to the exercise by the board of its power to order new and additional work. The ordering of new and different work does not involve the change or alteration of an existing contract, within the meaning of section 4073 of the Political Code. There certainly is a broad distinction between ordering the change and alteration of a contract by agreement and with the consent of the contractor, and ordering new and distinct work entirely outside the contract.

However, there is more language in said section which argues in favor of this construction. The section provides for a two-thirds vote of the entire board. This means four out of five. No such requirement exists with respect to ordering the improvement in the first instance, the adoption of plans and specifications, and the awarding of the contract. There is a reason for this, which in itself demands that the section should be restricted in its application to changes and alterations of the work mentioned in and provided for by the contract. Such reason is found

in different sections in *pari materia*. We will refer to a few of them.

In the case of public buildings the board must adopt plans and specifications, and must invite bids and award the contract to the lowest bidder, regardless of the amount involved (Sub. 8, section 4041, Pol. Code). A similar provision is found with respect to bridges, the cost of which exceeds $500 (Sub. 4, section 4041, Pol. Code). If the cost of construction or repair of a bridge is $200 and less, the board seems to have plenary power; and if such cost is more than $200 (but less than $500, see above), the construction or repair may be accomplished directly by the board or let out at contract; but if let out at contract, there must likewise be public notice, and proposals and bids must be invited, and the contract must be awarded to the lowest bidder (section 2713, Pol. Code). Similar provisions are found in different sections of the code with reference to the purchase of materials, and the awarding of yearly contracts for supplies according to samples (sections , Pol. Code).

When plans and specifications have once been adopted, and the contract let accordingly, upon public notice and to the lowest bidder, there seems good reason why the Legislature should desire to put a check upon the power of the board to order changes and alterations of work already contracted for and to privately agree upon the cost thereof. But no reason appears why the ordering and contracting for new

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and different work, in the manner in which original work generally may be authorized and contracted for, should be hampered by this provision for a two-thirds vote of the whole board, as it would be if said section 4073 were applicable to such a case.

If this section were applicable to a case of this kind, two members of the board could defeat the undertaking entirely by withholding their consent to an "alteration or change of the contract," without which the undertaking could not possibly be completed, though they were powerless to prevent the execution of the original contract, and would have been powerless to prevent its completion but for an untoward circumstance such as was unexpectedly encountered in this case.

No such intent can reasonably be imputed to the Legislature.

The indiscriminate and often collusive ordering or making of changes and alterations in the details and work mentioned and provided for in contracts of counties, during the progress of the work, is properly restricted, and the making of necessary or *bona fide* changes and alterations in the details and work of such contracts is aptly regulated, in the manner prescribed by section 4073 of the Political Code. And the language of the section is appropriate to cover such cases. But the language of the section does not readily lend itself to describe facts and circumstances, such as are instanced by the present case. New and

distinct work, such as is indicated by the record here, is not fittingly described in said section. And the scheme and mode of procedure prescribed by the section is so variant from that provided elsewhere for the letting of contracts for public work, that the section should not be applied to new and distinct work, outside of the contract, either voluntarily ordered or made necessary in material quantities by unforeseen conditions underground.

IV.

THE REASONABLE INTERPRETATION OF SAID SECTION IS THAT IT REFERS ONLY TO THE ORDERING OF WORK AND MATERIAL OF A LIKE CLASS, KIND AND QUALITY AS THAT WHICH IS REQUIRED FOR THE WORK CONSTITUTING THE SUBJECT MATTER OF THE CONTRACT, AND THAT THE SECTION CONTEMPLATES NO MORE THAN A POSSIBLE DEPARTURE FROM THE ORIGINAL DESIGN OR DETAILS OF THE PRINCIPAL AND INCIDENTAL WORK SPECIFICALLY CONTRACTED FOR. THE SECTION CLEARLY DOES NOT COVER WORK WHICH THE BOARD MIGHT, AFTER THE LETTING OF A CONTRACT, DESIRE TO HAVE EXECUTED, BUT WHICH WOULD NOT CONSTITUTE AN INTEGRAL PART OF THAT SPECIFICALLY CONTRACTED FOR.

Such a construction was given to the clause of a contract, whereby it was provided that the owner could request alterations, deviations, omissions, or additions,

the cost to be added or deducted from the contract price or the amount of the contract.

St. John vs. *Potter,* 19 N. Y. Supp., 230, 232.

We believe that section 4073, Pol. Code, means no more and should receive a similar construction.

This Court holds that the county in reality assumed that bedrock existed under the bed of the stream 27 feet 6 inches below the spring line of the arch of the bridge, as denoted on the map, and that in legal effect the representation on the map as to the presence and location of bedrock at the center pier was intended and designed to denote approximately its true location. And in conclusion this Court holds:

> "We think, as indicated, that the parties assumed that bedrock existed as delineated, and that it was tacitly understood that the delineation was approximately correct, and it was in that view that the minds of the parties met. Within the terms of the contract, therefore, Jorgensen Bros. were not required to sink and construct an additional 24 feet of the center pier to bedrock as it was found to exist."

This additional work was, therefore, beyond the scope of the work, as contemplated by the parties.

When the necessity for it became apparent the board of supervisors could not have contracted for it under the provisions of section 4073, because it was

new, different and independent work which the statute of this State would have required to be let to the lowest bidder.

All through the provisions of our Political Code runs the fundamental idea of competitive bidding and awarding contracts to the lowest bidder. Section 4073 dispenses with this requirement and contemplates a private contract between the board of supervisors and the contractor, in the cases for which that section was intended to provide. It is obvious that the said section must be restricted in its application in order to preserve its usefulness, and to prevent it from coming in conflict with other sections of the code.

For instance, sub. 4, section 4041, of the Political Code empowers the boards of supervisors to construct bridges within their respective counties, and in a proviso to the authority there given said statute directs that

> "where the cost of the construction of any bridge . . . exceeds the sum of $500, they must cause to be prepared and must adopt plans and specifications, strain sheets, and working details, and must advertise for bids for the construction of such bridge, in accordance with the plans and specifications so adopted. All bidders shall be afforded opportunity to examine such plans and specifications, and said board shall award the contract to the lowest responsible bidder, and the plans and specifications so adopted shall be attached to and become a part of the contract; and the person or corpora-

tion to whom the contract is awarded shall be required to execute a bond, to be approved by said board, for the faithful performance of such contract."

It is clear from the foregoing provisions, that the board of supervisors cannot let out private contracts, under section 4073 of the Political Code, for any part of an improvement which was omitted, either intentionally or by mistake, from the plans and specifications adopted and from the contract awarded under competitive bidding. To permit them to do so would result in a practical annulment of the provisions for competitive bidding.

This point was considered in a case where the question arose under the provisions of a city charter similar to those of said section 4073.

In that case the city council ordered new and additional work, and it was claimed that it was extra work which the council could order without advertising, under a clause in the charter authorizing the council to make changes or alterations in contracts. But the Supreme Court of Michigan held to the contrary, and said that said charter provision did not apply, using the following language:

"It is true that the paving of the gutters was within the scope of the improvement, but this did not confer upon the defendant the right to dispense with the charter requirement for competitive bids. The whole improvement required a certain num-

ber of cubic yards of excavation and embankment, also road gravel, screened gravel, top dressing, and a certain number of thousand feet of timber, and these were stated in the estimates. If the contract had been for making the excavations, which included only about one-third of the cost of the original contract, would it be contended that the defendant could let private contracts for the balance of the work upon the theory that it was within the scope of the improvement? The result would be a practical annulment of the provision for competitive bids. Under this theory a contract to grade might be extended into a contract to pave; a contract to pave with stone into a contract to pave with wood or asphalt at a greatly increased cost; a contract for any distinct part of a public improvement into one for the whole. . . . The changes covered by the above section of the charter, in so far as they can be held to authorize any change in the contract, are limited to the work provided for in that instrument. They cannot include distinct work not therein mentioned nor contracted for. It is of no consequence that a part of the public improvement is omitted from the estimate and contract by mistake. The result is the same as if it were intentionally done. This work of paving the gutters was entirely outside the contract. The private contract for the performance of the same was without authority and void."

Ely vs. *City of Grand Rapids*, 47 N. W., p. 448; *Auditor General* vs. *Stoddard*, 110 N. W., 945, 946.

The contingency which did happen in this case should have been within the contemplation of the county officers at the time of adopting the plans and specifications and letting the contract for the construction of the bridge, and the plans and specifications, the bids, and the contract should have made provision for this work conditionally, and if the bridge had been entirely within one county, the omission of said work from the plans, advertisement, bids and contract would have rendered the entire contract null and void.

McBrien vs. *Grand Rapids,* 22 N. W., 206;
Williams vs. *Topeka,* 118 Pac., 866;
City Street Imp. Co. vs. *Kroh* (Cal.), 110 Pac., 937;
In re Eager, 46 N. Y., 105-107.

Since this work should have been properly provided for in the plans and specifications and let out conditionally under competitive bidding and by the original contract, it naturally was and is original and not extra work, or altered or changed work, such as is referred to by section 4073 of the Political Code.

Also, it was new, different, and independent work because it was of a different and more difficult class than any of the work contemplated and provided for by the plans and contract. The plans showed bedrock at a depth of 2 feet 6 inches under the bed of the river (Transcript, folio 98, page 92). In reality it was

found 26 feet 6 inches below the bed of the river. The one was practically surface work. The other was difficult underground work, requiring new appliances, different treatment, and a more expensive and difficult method in its accomplishment. The compensation for this work could not be measured or adjusted on the basis of the price fixed by the contract for similar work, because there was no similar work mentioned or provided for in the contract.

Annapolis, etc. Co. vs. *Ross,* 11 Atl., 820;
Wood vs. *Fort Wayne,* 119 U. S., 320-321;
Mulholland vs. *New York,* 20 N. E., 858;
Cook County vs. *Harms,* 108 Ill., 151;
Merch. Exch. vs. *Butler,* 3 Tex. App. Civ., 378;
Allen vs. *Melrose,* 67 N. E., 1062;
Chicago vs. *Sexton,* 2 N. E., 265;
Lee vs. *Brayton,* 26 Atl., 256.

The fact that certain new and distinct work, outside of the contract, may be absolutely necessary to complete the work of the contract, can make no difference in connection with the construction of said section. There is no legal connection between such work and the work mentioned and provided for in the contract.

Such work requires a new contract made in the manner prescribed for the letting of original con-

tracts, and section 4073, Pol. Code, does not relate to that subject matter.

But when in addition to that the new and distinct work is of a different or more difficult class than any specified and provided for in the contract, it would be contrary to the general policy of the law, and in clear violation of the statute providing for public notice and competitive bidding, if such work were let out at private contract or in the manner provided in said section 4073.

Brady vs. *Mayor,* 20 N. Y., 312;
In re Eager, 46 N. Y., 105-107;
In re Merriam, 84 N. Y., 601-605;
In re Rosenbaum, 23 N. E., 172;
Murphy vs. *City of Albina* (Ore.), 29 Pac., 353;
Kamrath vs. *Albany,* 28 N. E., 400;
Ely vs. *Grand Rapids,* 47 N. W., 448;
Auditor General vs. *Stoddard,* 110 N. W., 946;
City St. Imp. Co. vs. *Kroh* (Cal.), 110 Pac., 937;
McBrien vs. *Grand Rapids,* 22 N. W., 206;
Williams vs. *Topeka,* 118 Pac., 866.

V.

THE REASONABLE INTERPRETATION OF SECTION 4073 OF THE POLITICAL CODE IS THAT THE SECTION REFERS ONLY TO CHANGES OR ALTERATIONS WHICH CAN BE MADE WITHIN THE LIMITS OF THE CONTRACT PRICE OR AMOUNT OF THE CONTRACT, AND WITHOUT INCREASING THE COST OF CONSTRUCTION.

Such a construction of the section would be almost imperatively required if the section did not contain the words: "and the cost thereof agreed upon between the board and the contractor."

The section would then read as follows:

> "Whenever the board of supervisors shall enter into a contract for the erection, construction, alteration, or repair of any public building, bridge or other structure, such contract shall not be altered or changed in any manner, unless they shall, by a vote of two-thirds of their number, and with the consent of the contractor, first so order. And whenever any such change or alteration is so ordered, the particular change or alteration shall be specified in writing. In no case shall the board pay or become liable to pay for any extra work done on, or extra material furnished for, such building or structure."

The concluding clause of the section is an absolute inhibition against payment or liability for extra work, or extra material, in the technical sense of the term.

It must be remembered that section 4073, Pol. Code, is not a grant, but a limitation of power. And it would be a violent presumption to assume that the section was meant to cover more than extra work or changes in the technical sense of the term. Such a presumption should not be indulged in the absence of language manifestly indicating such an intent.

The question is, conceding that the concluding part of the section is preclusive of any liability for extra work, was the forepart of the section designed to regulate the manner of incurring liability for new, different or distinct work, such as we have here, and which is not forbidden?

We think that no such construction of the section is required merely because of the words: "and the cost thereof (shall be) agreed upon between the board and the contractor," which are found in the section after the words "in writing."

A change or alteration, or an omission, is often ordered, which does not increase the cost of the building or structure, but which in fact results in a saving or reduction of cost. And an addition or extra work can often be agreed upon, within the amount of the contract and without additional cost or expense. In such case it is proper that there be an adjustment of details and items, and, if the change or alteration results in a saving, that there be a deduction agreed upon. Or, in the language of said section, the par-

ticular change or alteration should be specified in writing, and the cost thereof agreed upon.

Such a change or alteration requires "the consent of the contractor" referred to in the section. The words "with the consent of the contractor" are descriptive of the kind or character of change or alteration which the Legislature had in mind. Ordinarily it does not lie in the mouth of the contractor to object to new, different and distinct work, for which the owner becomes obligated to pay when he orders it. Such work does not impair, change, or alter the existing contract. And, hence, when the Legislature dealt with a change or alteration of the contract with the consent of the contractor, it is fair to assume that it did not mean to refer to an order or contract for work entirely outside of the contract.

We think that the section contemplates no more than a possible departure from the original design or details of the work contracted for, or necessary or convenient alterations or changes which can be ordered or agreed upon entirely within the scope and limits of the contract, and subject to the paramount condition that in no case shall the board pay or become liable to pay for extra work occasioned by such changes or alterations. The latter part of the section does not forbid extra work, but merely forbids payment or liability therefor. And the forepart of the section does not in terms or by necessary implication refer to the making of a contract for new and inde-

pendent work, that is to say, for work outside of the contract. The term extra work, in the sense in which it is used in the latter part of the section, means a change or alteration of the contract within the meaning of the forepart of the section. The change or alteration of the contract, or extra work, referred to in the forepart of the section, is expressly given a qualified meaning by the additional words "with the consent of the contractor," and as thus limited it means substantially the same thing as a change or extra work for which no payment shall be made or liability incurred, as provided by the latter part of the section. Thus the entire section refers to one subject matter.

Such a construction is in harmony with all the other sections of the code in *pari materia*. It fits into the entire scheme of legislation. It brings section 4073 within the policy of the statutes providing that all contracts, except in some cases, contracts below a certain amount, shall be awarded upon public notice to the lowest responsible bidder. It brings said section within the spirit and intent of the law providing that plans and specifications must be adopted, which shall include and provide for a complete undertaking, and all the principal and incidental work within the scope of the improvement to be let and contracted for. The policy of the law is to prohibit additional expense or liability for extra work in any case. Section 4073 so provides most explicitly and

emphatically, and this provision of the section is calculated to prevent the provisions for competitive bidding to be circumvented by intentional omissions of parts of the work from the plans, specifications and advertisement, or to be defeated by such omissions due to negligence, carelessness, mistakes, or unavoidable and unforeseen circumstances.

Indeed, it would be strange for the Legislature to entirely preclude and forbid liability or payment for extra work and materials, with that end in view, and in the same breath and by the same section sweep away all those safeguards and precautions and to contemplate or permit unlimited liability to be incurred by private arrangement between the board and the contractor for new and additional work outside of the plans and the contract, in the manner provided by section 4073 of the Political Code.

And such a construction of the section as is here contended for restricts the section in its meaning and application to the scope of the subject expressed in the headnote or title of the section, which is: "Contracts not to be altered, etc.," the word "etc." evidently referring to the inhibition against paying or becoming liable for extra work. So that the headnote of the section means the same as if it read: "Contracts not to be altered by paying or incurring liability to pay for extra work or material." And that is the scope of the section and of its application.

Barnes vs. *Jones,* 51 Cal., 306;
Sharon vs. *Sharon,* 75 Cal., 16;
Dungan vs. *Superior Court,* 149 Cal., 101-102.

The section does not entirely forbid alterations of contracts, but forbids payment or liability for extra work, and regulates the mode and manner of ordering changes or alterations of contracts which can be made within the absolute inhibition of the section.

That particular subject is not treated or regulated anywhere else in the code, and there are many manifest and obvious reasons for expressly regulating it. So that it is not necessary to enlarge the scope of the section by construction for the purpose of effectuating it and finding for it a subject upon which to operate, which otherwise we might be compelled to do.

There is only one more point to be considered in this connection. Section 4072 of the Political Code regulates the alteration or change of plans and specifications by the board of supervisors, and provides that they shall not be altered or changed "whereby the cost of the building or bridge is increased," except by a two-thirds vote of the board. It might be claimed that this section, immediately preceding section 4073 under discussion, has some connection with the latter section. It might be argued that the two sections belong together, and that section 4073 was designed to regulate changes and alterations of contracts, when the board has changed the plans and specifications and

thereby increased the cost, in the manner provided by section 4072.

We think that there is no room for such a contention when section 4072 is read and construed as it must be.

In the first place section 4072 refers to changes in the plans increasing "the cost of the building, bridge, or structure," and not merely to an increase of the cost of constructing the building as originally planned. Primarily this section refers to a change of plans and specifications. The plans may be changed so as to decrease the cost of the building or bridge, or so as to increase it. In other words, this section refers not only to changes within the original scope of the improvement, but also to radical changes which might alter the whole scope, character or extent of a public improvement of the kind mentioned in the section.

If plans or specifications are ever changed or altered in that manner or to that extent, it necessarily must be before the contract is let. We do not mean to be understood as saying that the scope, character, or extent of a public improvement of the kind enumerated in the section cannot be radically changed by adding to or enlarging it, and that plans and specifications cannot be provided for such additional part, after a contract has once been let. But we do mean to say that such a transaction involves the original adoption of a new and independent set of plans and specifications, having no *legal* connection with the other, or the

adoption of an original set of plans for a new and distinct undertaking having no *legal* connection with the other, and does not involve a change or alteration of plans and specifications within the purview and meaning of section 4072.

The scope of this section, like that of the other, is defined by its headnote, which reads: "Plans, etc., not to be altered."

Inasmuch as there can be no binding plans until they are finally adopted by the board, we take the headnote of the section to mean what it says, and that the change or alteration provided for in the body of the section refers to plans once adopted but not yet final or acted upon by advertising "for bids for the construction of the bridge (or building) in accordance with the plans and specifications so adopted," and by awarding the contract to the lowest bidder and "attaching to and making a part of the contract" such plans and specification.

Necessarily, if the change of the plans is such as to decrease the cost of the building or bridge, it must be made before the contract is let, because afterwards such a change could not be made without the consent of the contractor. Subsequent changes are provided for by section 4073, which speaks of the consent of the contractor, whereas section 4072 does not refer to such consent. Consistently with such contention, section 4072 speaks of an increase of cost of the building, whereas section 4073 does not, but on the contrary

absolutely forbids it. A clear indication that said sections are not intended to supplement each other, or that they are in no wise related, which becomes still more manifest when we consider that there is nothing in section 4072 preventing a change of plans downwards in cost by a majority of the board, whereas the change or alteration in section 4073 requires a two-thirds vote of the board, while at the same time it must not involve payment for extra work or extra materials.

This construction of the two sections also finds support from a reference to other sections of the code in *pari materia.*

In the case of a bridge, if the cost of construction exceeds $500.00, the board "must cause to be prepared and must adopt plans and specifications." This means that the board must finally adopt the same before the contract is let, since the power of the board to enter into the contract depends upon such final adoption of the plans and specifications, as is evidenced by the language of the statute immediately following, to-wit: "Must advertise for bids for the construction of such "bridge in accordance with the plans and specifi- "cations so adopted . . . and said board shall "award the contract to the lowest responsible bidder, "and the plans and specifications so adopted shall be "attached to and become a part of the contract."

Sub. 4, section 4041, Pol. Code.

In the case of a building it is provided: "None

"of the aforesaid buildings shall be erected or con-
"structed until the plans and specifications have been
"made therefor and adopted by the board. All such
"buildings shall be erected by contract, let to the
"lowest responsible bidder, after notice by publica-
"tion."

Sub. 8, section 4041, Pol. Code.

As has already been shown in another part of this petition and argument, the policy of these provisions of law is to give the county the benefit of competitive bidding. To that end the board must not be permitted to omit any part of the contemplated improvement from the plans and specifications, upon which bids are had and the contract is based, and then add to the improvement by changing the plans afterwards and letting out the added work at private contract. This would be against the spirit and intent of the provision for competitive bidding; and to permit the board of supervisors to do so would be to permit them to circumvent and violate the law.

By all the known rules of statutory construction section 4072 must be held to refer to a change of plans and specifications at any time before the letting of the contract, but not afterwards.

We must assume that if the Legislature had intended otherwise, it would have so declared directly and unequivocally.

The provisions of section 4072 do not by their terms

apply to changes and alterations of plans and specifications after the letting of the contract. And the provisions of section 4073 providing for changes and alterations of contracts do not in terms apply to changes and alterations whereby the cost of the building or bridge is increased. The provision in section 4072 referring to changes of plans and increased cost cannot, in the absence of some direct and unequivocal language, be construed as importing into section 4073 an authorization to effectuate a change of the plans and specifications whereby the cost of the bridge is increased, after the contract has been let, and by altering and changing the contract.

Before the statute, prescribing full and complete plans and specifications of the entire contemplated improvement, as a whole, and requiring competitive bidding, can be held to have been superseded by sections 4072 and 4073 together, a manifest legislative intent to that effect must clearly appear. This rule of construction is pertinently illustrated in a case to be cited, by the following apt language:

> "The provisions of the first part of section 25 do not by their terms apply to accepted streets, but merely authorize the city council to 'repair' streets upon which certain work has been done; and the provisions of the latter part of the section requiring advertising and assessment, when the work to be done upon an unaccepted street is new work of the same character as had been previously done,

cannot be construed as importing into the first part of the section a condition that the repairs therein authorized are to be made upon an accepted street. We must assume that if the Legislature had intended that the express provision which it made in section 20 for the improvement and repair of accepted streets, and for a fund out of which the expense should be paid, should be superseded by the provisions of section 25, it would have so declared in some direct or unequivocal language."

Santa Cruz R. R. Co. vs. *Broderick,* 113 Cal., 633-34.

Furthermore, if section 4073 were held to have been intended to provide the mode and manner of effectuating and carrying out the change of plans and specifications referred to in section 4072, it would also have to be held that the consent of the contractor is necessary to such change and alteration; since under section 4073 the contract cannot be altered without such consent, or rather, since that section only refers to a change or alteration of the contract "with the consent of the contractor," and to "cost agreed upon between the board and the contractor." The power of the board then is limited to a transaction or agreement between the board and the contractor. The board under section 4073 is powerless to deal with any one else but the contractor. Suppose he were unable from any cause to handle the job after the plans and specifications have been changed under section 4072 and that he

refused to give his consent to any alteration or change of the contract as required by section 4073. Clearly, in such case, the changes or alterations of plans and specifications made by the board under section 4072 could not be effectuated at all, since the mode and manner prescribed by section 4073 is exclusive, and if that section did apply the thing would have to be done in that mode and manner, or not at all. Besides, why require a two-thirds vote for a change of the plans, and again require such a vote for a corresponding change of the contract? The cost of the change or alteration can be agreed upon by a majority of the board in any event, because section 4073 does not in that connection require a two-thirds vote of the Board. So that there is no possible reason for requiring a two-thirds vote for a change of the plans, as provided by section 4072, and again a two-thirds vote for a corresponding change of the contract, as provided by section 4073.

We respectfully submit that section 4073 of the Political Code of this State is inapplicable to the case at bar, and hence, that the said statute is not preclusive of the county's liability for the work in suit, and inasmuch as it is clear from the later decision of *Gardella* vs. *Amador County* that the decision in *Croley* vs. *California Pacific Railroad Company,* 134 Cal., 557, wherein it is decided in effect that the supervisors of a county have plenary power in the making of contracts for the construction of bridges crossing

streams which separate two counties, is still the rule in this State, that therefore with reference to the added structure in the case at bar the counties would be bound by the implied contract, or the equitable estoppel, as the case may be, arising from the facts that they, through their superintendent, insisted that the contractor should construct the addition to the pier and that they afterwards accepted the bridge as an entirety and have since continued to use it.

See Point V, Reply Brief of Plaintiff in Error, and authorities cited.

For the foregoing reasons it is respectfully submitted that a re-hearing should be granted to this Court.

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PAUL C. MORF,
Attorneys for Petitioner.

State of California,
City and County of San Francisco.—ss.

We, the counsel for said petitioner, do hereby certify that in our judgment said petition is well founded, and we further certify that the same is not interposed for delay.

F. J. SOLINSKY,
FRANK R. WEHE,
PAUL C. MORF,
Attorneys for Petitioner.

15

No. 2121

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. WILL JORGENSEN,
Plaintiff in Error,

vs.

COUNTY OF TUOLUMNE (a municipal corporation of the State of California),
Defendant in Error.

ORAL ARGUMENT OF WALTER SHELTON ON BEHALF OF DEFENDANT IN ERROR.

Preface.

In view of the fact that the reply brief of plaintiff in error was filed after oral argument and is to a great extent a reply to that argument, and since there was, therefore, no opportunity to discuss its various features, permission has been granted defendant in error to edit and file the material part of the oral argument in its behalf.

Construction of the Contract.

Plaintiff in error has never seen fit to confine himself to any particular theory upon which to base

a recovery and we are, therefore, put to the necessity of answering the sufficiency of his case from every possible point of view. There are only two theories upon which a recovery could possibly be had; one, that plaintiff was required by the contract to furnish labor and material in suit, but notwithstanding such requirement he is entitled to recover because of the warranty or misrepresentation of a material fact; the other, that plaintiff was not required to furnish such labor and materials under the contract and that by reason of his having done so, a liability in law was raised upon which he can recover.

According to our view of the case, the plaintiff was required to furnish the labor and material in question in order to fulfill his promise and agreement; that the performance of this work was only the performance of his contract for which he was paid when he received the contract price. In section three of our brief we have already quoted various provisions of the contract and stated in a general way our reasons why we think this view is the correct construction of the contract in suit. It will, therefore, not be necessary to repeat those reasons here, and we shall content ourselves with a brief statement of those principles which we think will answer plaintiff's objections on this point.

Plaintiff's contention is, briefly, that the representation in the plans as to the length of the middle pier is such a limitation of the contract that everything done below the point indicated is outside its

terms and that the performance of the contract did not require plaintiff to furnish such labor and materials; whereas, it is our conclusion that the express terms of the contract stating its fundamental purpose and main intent are controlling and cannot be limited or abrogated by any mistake in matters of description. There is no question but that the first purpose of the contract was to provide a serviceable bridge supported by piers with foundations in bed rock and that this plain intent could not be abrogated by any repugnancy in the detail description set forth in the plans, for, as stated in section 1650 of the Civil Code, particular clauses of a contract are subordinate to its general intent.

Plaintiff points out the clause in the specifications which requires the bridge to be of the *dimensions* shown on the plans and insists that since the distances stated in the plans as to certain dimensions of the bridge, such as the width of the bridge and height of the railing, are controlling, therefore the length of the middle pier stated in the plans must, likewise, be accepted as absolute and consequently the controlling provision of the contract on this point. Assuming, without admitting, that certain dimensions showing on the plans, such as those stating the width of the bridge, are controlling, the argument relative to the pier based upon that analogy is we think unsound for the reason that the true dimensions of the pier as shown on the plans is from the spring line of the arch to bed rock whether that distance be great or small. In

this connection the plans do not simply show a distance projected into space without any objective, as in the case of the width of the bridge or the height of the railing where the measurements in the plans stand alone and are absolute; they show something more than a projected line and the length thereof. The survey represented on the plans shows first a specific point, the spring line, that is, the base of the arch, so connected with natural objects on the bridge site as to make its location definite and certain. The plans also show as another objective point the bed rock in the center of the stream whose actual location on the site could also be established; and finally they show a pier extending from one to the other. But the plans, having been drawn to scale, can, by mathematical computation, be said to state the distance between these two points inaccurately; and it is therefore argued that the real dimensions of the bridge shown on the plans and called for by the contract are not to be measured from the points designated in the plans, but merely by the distance stated, whether such distance was or was not the actual distance between those two all important points. Must all these representations on the plans showing essential objective points and calling for a pier from one to the other as well as the fundamental purpose of the contract requiring an entire and complete structure yield to the simple statement of distance in feet and inches? Can it be said that a statement gathered from computation by scale as to the length of the

pier in feet and inches is so all controlling that if the actual distance to bed rock had been ten feet less than the length of the pier shown on the plans, it would have been necessary, nevertheless, under the contract for the plaintiff to continue the excavation in bed rock for ten feet in order to comply with the contract? Of course not. It is a well settled rule of law that in matters of description, courses and distances yield to the actual location of specified points. Whenever a survey, as in this case, shows the undisputed objective points and states the distance between them but states it erroneously, the statement of distance is always discarded and the actual distance between the established points accepted as the true description. When repugnant, established points control; courses and distances yield (*5 Cyc.* 913). This specific rule is in keeping with the general principle announced in section 1650 of the Civil Code heretofore cited.

The principle that the general intent and fundamental purpose of a contract will be followed regardless of inaccuracies or repugnancies in matters of detail and description, finds specific application to construction contracts like the one at bar in the cases which we have cited in our brief. These cases are distinguished from those cited by plaintiff and the principle involved well stated by Mr. Wait in section 240 of his valuable treatise on engineering contracts, where it is said:

> "The American courts have distinguished those cases in which the contractor is merely

> to build according to certain plans and specifications from those cases in which he is not only to build according to the plans and specifications, but is also to completely finish and deliver up a structure, ready for use as it were. So where a building was to be built according to very detailed plans and specifications, and owing to the latent condition of the soil the foundations sunk, the court held that a stipulation in the contract by which the contractor undertook 'to completely finish and fit for use and occupation' the buildings, was a covenant by which he was bound."

The case there referred to is that of *Dermott v. Jones,* 2 Wall. 1. As will appear from a reading of that case, a performance of the contract was not accomplished by following the plans alone because the general intent of the contract to build and deliver a complete structure controlled the various provisions of the plans, just as in this case the controlling provision in the contract is the undertaking "to provide a complete structure", so that the bridge when completed would "support with safety at least a live load of twenty tons concentrated on any sixteen square feet of deck".

Likewise in *School Trustees v. Bennett,* 27 N. J. L. 513, it was held that a provision in the contract sued on requiring plaintiff to complete a building for an entire price is controlling and he must do everything required to that end and if necessary, he must drive piles to furnish sufficient foundation although the contract did not call for them, and regardless of whether or not the contract contained

a trade phrase which meant that the foundation wall should be eight feet deep.

The point is clearly illustrated in *Dean v. Mayor*, 167 N. Y. 13, 60 N. E. 236, wherein the municipal authorities advertised for bids for the laying out of a new street and an agreement was entered into in which plaintiff agreed that he would "complete the entire work in substantial accordance with the specifications and plans therein mentioned", but the plans showed several hundred feet less work than the general terms of the contract indicated, thus presenting a situation similar to that now before the court. In deciding the point favorably to our contention the court said:

> "In my opinion, if there is a discrepancy between the contract of the parties and the plan of the work to be performed under it, the former should control. I do not think that the implications from the plan, which seem to have influenced, more or less, the opinion of the majority below, should prevail over the clear terms of a contract, wherein the contractor has covenanted to furnish all the materials and labor for the performance of a certain described work, directed by the common council and advertised for by the department. * * * The proceedings, which preceded the making of the contract and authorized it, indicated an intention to carry out the ordinance by an entire contract and the office of the plan was to show the manner of performance. * * * I am of the opinion that as the parties have contracted for the doing of a work prescribed by a municipal ordinance, the agreement must be deemed to relate to the work as directed and to control, and that the plan accompanying is

> subsidiary thereto. The contract expressed, and was intended to express, the agreement of the parties to it and measured the extent of their several obligations; while the plan, in accordance with which the contractor agreed to complete the work, was the chart by which he was to be guided in its performance."

These cases are discussed at length not only to illustrate the principles which we are urging but also to show that such principle is properly applicable to the facts at bar.

The cases cited by plaintiff do not really quarrel with the point here made. They are not cases calling for a complete structure and are not, for the most part, entire contracts providing for the payment of a lump sum. They are, therefore, distinguishable as contracts to carry out the requirements of specifications and cannot be treated as contracts to deliver a complete structure, as is the case here. In the case of *Delafield v. Westfield,* 28 N. Y. Sup. (Supreme Ct. Gen. Term) 443, in *Langley v. Rouss,* 82 N. Y. Sup. 1082, and in *Smith v. Salt Lake City,* 83 Fed. 784; same case in the Circuit Court of Appeals, 104 Fed. 457, cited by plaintiff on this point, the contracts were not entire in the sense that a structure was to be completed for a lump sum, but the contracts provided for a certain price per unit of work; and in the federal case there was no provision in the contract at all fixing the amount of work, so of course the specifications were controlling. Furthermore, in that case the contract was let for the construction of an aqueduct along a par-

ticular route of construction and it was required along an altogether different and more expensive line—a clear case of making a new contract by the acts of the parties; the only question there involved was whether an agreement to construct a pipe line in one place binds a party to construct it in a different and more difficult place.

In *Langley v. Rouss,* 82 N. Y. Sup. 1082, there was no undertaking to complete a structure, but merely to perform a fractional part of the work.

Horgan v. Mayor, 55 N. E. 204, is also cited. The only question presented there, material to this point, is whether or not a contract to furnish "all the labor and material required for conducting the flow of water and draining off the water from the bottom" could be so construed as to require plaintiff to pump water out of the pond when the sewer provided for draining off the pond failed to fulfill its purpose. In the light of surrounding circumstances, the court held that the terms *"conducting the flow and draining off from the bottom"* could not be so construed as to include *pumping* the water out over the side of the pond.

Plaintiff seeks to distinguish the case of *Stuart v. Cambridge,* 125 Mass. 102, cited by us in our opening brief, from the case at bar. In that case the plans show definitely the depth of the foundation, whereas, the specifications required the foundation to go to sufficient depth to reach solid ground. The plans in that case represented the depth of solid

ground as definitely as did the plans here, but it was, nevertheless, held in that case that the specifications and not the plans should be followed. We fail to see any material distinction between the specifications in that case and the one before the court. In neither case did the specifications attempt to locate bed rock. In this case the specifications contained the simple absolute requirement that the foundations shall extend to bed rock, whereas in that case the same provision was embodied in the specifications with the qualification that the foundations must, notwithstanding the depth to solid ground be at least fourteen inches deep. It seems to us the two cases are perfectly identical.

In the case at bar, we are also aided by the express provision quoted in our brief to the effect that any representation contained in the plans should not limit the requirements of the specifications, and vice versa.

For these reasons, as well as those stated in our brief, we believe plaintiff was required to furnish the labor and materials in controversy in order to perform his contract. On page 17 of plaintiff's reply brief it is stated that it was necessary for plaintiff to furnish the labor and materials sued for in order that he might not lose the work already performed, and it is also further stated that he either had to do the work or be placed in the position of a defaulter under the contract with the county. In this statement we heartily agree, because, for the

reasons already urged, we think the performance of the contract required him to do those things.

No Action for Warranty or Misrepresentation.

As a consequence of the foregoing conclusion, we believe that if plaintiff is entitled to any relief at all, it is not upon the theory of a new contractual obligation created by law because nothing was done outside the contract, but upon the theory of a warranty as to the correctness of the plans or for the misrepresentation of a material fact.

We think we have already shown fully in our brief that plaintiff is not entitled to recover upon the theory of an implied warranty because warranties are not implied under the facts stated and for the further reason that the law casts upon plaintiff the duty to determine for himself whether or not the proposed plans and specifications correctly outline the work to be completed.

Plaintiff seeks to obtain comfort on this point out of section 1656 of the Civil Code, but the argument there advanced is fully answered by the quotation in *Thorne v. Mayor*, set forth in our brief. A further reading of that case shows it to have been the opinion of the House of Lords that any custom or usage of contractors under which they rely on the specifications is "an usage of blind confidence of the most unreasonable description". If the requirement in the specifications that bidders should view

and judge for themselves of the nature and character of the *work* on the ground means anything at all, it is certainly clear that it was not the intention of the county to warrant the accuracy of the plans and specifications.

If this work is to be treated as covered by the contract and there is no implied warranty, recovery must be based, if at all, upon the intentional misrepresentation of a material fact. The record in this case does not show an intentional misrepresentation but does show an equal opportunity available to both parties to determine the correctness of these representations. This particular feature of the case has already been fully treated and nothing remains to be done, except to consider plaintiff's claim that a cause of action for fraud and deceit may be maintained against a county in this state. Plaintiff does not undertake to upset the general proposition that a county in California can not be sued ex delicto, but claims that an exception exists in the case of matters arising in connection with public highways and bridges, and cites the case of *Colman v. San Mateo,* 75 Fed. 520. This case, we think, never was the law and was certainly repudiated by Judge Morrow himself in the case cited in our opening brief. The matter has been squarely adjudicated in *Huffman v. San Joaquin Co.,* 21 Cal. 426, where it was decided that

> "a county is not liable in damages at the suit of an individual for injuries sustained by him in consequence of the want of proper repairs to a bridge on a public highway of the county".

Claim Barred by Limitation.

We have already fully discussed the facts of the case showing that if any collateral liability could or did arise against the county by reason of any misstatement in the plans, it arose at the time of the execution of the contract or, at the latest, when the error was discovered and the plaintiff had completed performance of the work in controversy. This was more than a year before the claim was presented to the board and any claim that may have existed was, therefore, barred under section 4075 of the Political Code. Plaintiff undertakes to answer us on this point by the contention that the claim in suit does not come within the provisions of this section of the Code and that the cases cited in our brief requiring such claims to be presented to the board of supervisors, were under statutes materially different from the present section. In this, the plaintiff overlooks the case of *Rhoda v. Alameda Co.,* 52 Cal. 350, which was decided under a statute absolutely identical with the one here involved. The section then provided that the "board of supervisors must not hear or consider *any claim*" unless presented, which is the identical language of the present statute. Under such a statute it was held that the words *any claim* covered a suit for damages to property and that the presentation of the claim to the board of supervisors was a condition precedent to recovery. And in *McCann v. Sierra Co.,* 7 Cal. 121, it is said that

> "the intention of the Legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit."

Plaintiff has cited a few cases against municipal corporations which are based on altogether different statutes and cannot be treated as applicable. It will be borne in mind that counties are mere political subdivisions of the state and cannot be sued except upon compliance with statutes granting a right of action and that the general principles relative to a suit against municipal corporation are not to be accepted as controlling.

No Implied Contract.

Assuming that this work was not required by the contract, was not done under the contract, and that, as plaintiff says, this work "was new and additional" work outside the contract, is plaintiff entitled to recover? We think not. In section 10 of our brief, we have already set out the statute and referred to the cases supporting our position. We shall therefore proceed at once to consider plaintiff's objections to our conclusions.

Plaintiff insists that the statute quoted relates only to extra work or extra compensation for work within the terms of the contract. This, it seems to us, is

self-contradictory. Work required by and done under a contract cannot be extra work, because the very meaning of "extra work" is something outside and beyond the terms of the contract. The only way there can be such a thing as extra work under a contract, is in those cases where the agreement makes provision for work which is not required by the contract but may be decided upon by the parties in the course of construction. In such cases we find loose language speaking of extra work done under the contract, but by what rule of construction can we read such a meaning into this statute, and especially in this case where the contract provides for a complete structure, thereby impliedly negativing the idea that any work except that called for by the contract was ever to be performed.

The statute does not say that the board shall not pay for extra work done *under a contract,* but without restriction says that the board shall not pay for *any* extra work done on or materials furnished for any such building or structure. Is it possible that if the board shoud draw a contract settling in advance what the rights of the parties should be as to extras that the statute would make void such timely provisions entered into when the contractor is willing to make fair stipulations in order to get the contract, but that if the contract is silent so that such extras are entirely outside its terms, then the law will raise an obligation? To answer this

question in the affirmative would be to say that the purpose of the law is to prevent express contracts concerning extras and at the same time leave the way open for implied contracts. All the courts say an implied contract cannot be raised against a county where an express contract cannot be made. The law will not imply a contract against the provisions of the statute.

The plaintiff says that section 4073 of the Political Code does not apply to work of this kind because the bridge was constructed between two counties, and cites as authority the case of *Croley v. California Pacific Co.,* 134 Cal. 559. This case does not deal with section 4073 at all, for the very obvious reason that the contract under consideration there was made by the board of supervisors in 1893, long before this section was enacted. That contract was performed and suit thereon was instituted in 1895, but the provisions of section 4073 were not enacted until 1897. It could therefore in no wise affect the rights of the parties in that suit, because it is settled law that the validity of a contract is determined by the law as it stood when made, and the rights of the parties are finally vested and fixed when the performance of the contract is completed. That case decided that subdivision 4 of section 25 of the County Government Act (which is the same as subdivision 4 of section 4041 of the Political Code), requiring contracts to be let to the lowest bidder, did not apply to bridges between counties

because the bridges spoken of in that section were bridges *"within the county"*. There is no such limitation in sections 4072 and 4073. These sections say that whenever the board shall enter into a contract for the erection, alteration or repair of *any public building, bridge or structure,* the board shall *in no case* become liable to pay for *any extra work* done on, or *extra materials* furnished for any such building or structure. More sweeping language could not be used.

That case had nothing to do with an implied contract, but dealt with an express contract, which in no sense of the word provided for the construction of a bridge but really purchased the use of a bridge of the railroad company. There is nothing in the case that says that an implied contract would have arisen in the absence of an express contract. No doubt plaintiff's real purpose in citing the case was to argue that since an express contract could be made for the construction of a bridge between counties without advertising for bids, an implied contract could therefore be raised, and that the cases denying the right to hold a county upon *quantum meruit* might thereby be distinguished. Even though it was not necessary to advertise for bids for the construction of the bridge between two counties, there are nevertheless other conditions precedent just as important as advertising for bids, which prevent the raising of an implied contract just as effectually as the provision for bids. Sec-

tion 4073 expressly prohibits the board from paying for work not included in the contract, and also from changing or altering the contract unless the board shall by a vote of two-thirds of their number "*first* so order" and specify the change in writing and agree upon the cost thereof. These are the conditions precedent upon which a contract covering construction not included in the original contract must be made. Can a contract be raised by implication of law when these things are not done? The authorities say no.

In *Fountain v. Sacramento,* 1 Cal. App. 461, plaintiff sued defendant for the value of bricks furnished by him to the city at the request of one of the trustees, which were used by the city in the construction of a wall. But there was no contract made in accordance with the city charter, which provided that "no contract shall be effective unless authorized by vote of the board of trustees". It was there decided that there could be no implied contract in the face of such a provision, and in so holding the court said:

> "The case may appear to justify the doctrine of equitable estoppel. * * * It seems to us, however, that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal boards of trustees to incur liabilities, which have been placed in charters, it will be impossible to bring any such results about if the provisions must give way under all circumstances to the principle upon which equitable estoppels are generally applied. * * * To do this would be to throw

> down all the bars that have been raised to protect the people from the consequences of charter violations, and would smooth the way to dangerous inroads upon the municipal treasuries. There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed,—especially where the loss falls upon one who has knowingly taken upon himself the risk of loss."

The same thing was held in *Times Publishing Co. v. Weatherby,* 139 Cal. 618, where it was decided that under a charter providing as does section 4073 that there should be no liability unless a contract is made in writing by order of the council, there could be no recovery upon an implied contract where this provision had not been complied with.

So, in *McDonald v. New York,* 68 N. Y. 25; 23 Am. Rep. 144, it was held that no implied contract could be raised against defendant for materials furnished and used by it, in the face of a statute requiring contracts for such materials to be made in writing and recorded.

Likewise, in *Wolcott v. Lawrence County*, 26 Mo. 272, it was held that no implied contract could be raised against a county for the construction of public buildings, because the statute required the county to set aside a fund as a condition precedent to the making of a contract for the construction of a public building.

It must therefore be apparent that whether or not it was necessary to advertise for bids for the construction of the bridge in this case, as a condition precedent to the making of any contract in connection with such construction, there are, nevertheless, various requirements contained in section 4073 which operate to prevent the raising of an implied contract, just as effectually as would the provision requiring bids.

Plaintiff cites the case of *Argenti v. San Francisco,* 16 Cal. 265, and *Contra Costa Water Company v. Breed,* 139 Cal. 432, and *Sacramento County v. Southern Pacific Company,* 127 Cal. 217, as authority for the position that an implied contract can be raised against a county by way of estoppel in this case.

As to the first two cases mentioned, we will again call attention to the fact that the defendant in each of these cases was a municipal corporation, and not a county, and that the liability was incurred in the exercise of corporate municipal powers; wherefore such cases are clearly distinguishable from those involving a county. Municipal corporations are public entities voluntarily organized, and have much more extensive powers than a county, which is merely a political subdivision of the state and is subject to absolutely no liability except such as is imposed by express provisions of the statute.

The last case, however does deal with a county, but there the county was seeking to recover back moneys already paid, and occupied the position of

a plaintiff, which for obvious reasons makes it clearly distinguishable from this case. Where the equitable powers of a court might not upon grounds of estoppel be exercised to restore a county to its original position where it had received the benefits of the work and labor performed, it occupies an altogether different position when it seeks by way of defense to preserve the *status quo.*

Section 2713 of the Political Code must also be reckoned with as preventing the raising of an implied contract. The provisions of that section deal expressly with bridges between counties, and say that

> "each of the counties into which any such bridge reaches shall pay such portion of the cost as shall be previously agreed upon by the boards of supervisors of said counties".

Just as the provisions of section 4073 prevent the raising of a contract by operation of law, so do the express provisions of this section. Each county shall pay the portion of cost *previously* agreed upon by the boards of the two counties. A previous agreement providing for the erection of the bridge is a condition precedent to the power or authority of either or both counties to make a contract for its construction. The law does not apportion the liability of each county, but leaves that to the express agreement of the counties, for the patent reason that the benefits to one county may greatly exceed those to the other. How, then, can the law imply a contract when it cannot fix the liability of either or

both counties, and how can it be said that the law will fix the entire liability upon one county? Because of mistake or warranty? But, as we have already pointed out in section 2 of our brief, if this work was outside the contract there was no mistake or breach of warranty of which plaintiff could complain, for the simple reason that the mistake limited the scope of the contract and thus relieved plaintiff of any liability which the contract might have imposed upon him if there had been no mistake. Even if there was an agreement between the two counties apportioning the cost, under the contract made with plaintiff it could have no application to the $7000 now sued for if the construction involved was "new and additional work" not required by the contract. This provision of the statute comes clearly within the rule of those cases which prevent a recovery upon either express or implied contract against a county, where it is required to set aside a fund for an expenditure and such action is not taken.

Plaintiff tries to get away from these provisions of the statute and the cases interpreting them, by saying that although this work was outside the contract he was compelled to do it under the contract; that he "either had to do this work or place himself in the position of a defaulter under a contract with the county", and that the work was necessary "in order to save the contract" (reply brief, pages 17, 23), and that therefore these cases are not applicable.

If this work was not called for by the contract, plaintiff was not bound to do it, for nothing else bound him to work for the county. If the contract did not require the work, it was plaintiff's duty to stop when he had excavated to the point required by the contract and demand that defendant put the premises in such condition as would permit him to proceed with the performance of his agreement. In the absence of stipulation, as in this case, there is no law which compels one party to a contract to perform the pre-requisite obligations undertaken by the other party, and after having done so, to proceed with the performance of his own side of the agreement. Nor is this all. If one party should enter into a contract with another to construct a building upon certain foundations, and the other party had expressly agreed to furnish such foundations, and failed to do so, the first party would not even be authorized, much less compelled, to provide the foundations and then perform, because the law gives the second party the alternative of either performing his contract or breaching it and paying damages. There is no law which authorizes or compels one party to perform the contract of another, when the latter is permitted by law either to perform or breach.

The law imposes upon plaintiff knowledge and notice of the limitations of the county's contractual powers. If this work was outside the contract and the county was bound to make good the statement as to the length of the pier, it was not plaintiff's busi-

ness to come forward and do it for the county; it was his duty to call defendant's attention to the mistake and permit it to make a contract in compliance with the statute for the performance of that portion of the work not covered by the contract, or to alter the original contract in the manner provided by law so as to cover the construction in dispute. And if, as plaintiff says, this contract bound the county to make good its representations in the plans, and the county had refused to do so, he would have had his remedy upon an express contract, legally entered into, for the damages necessary to make him whole. Why, then, was not plaintiff just as free an agent in the performance of the construction below the point indicated on the drawings, as was any one of the plaintiffs in the cases above cited?

For these reasons, in addition to those stated in our brief, we think the order of the lower court granting a nonsuit should be affirmed.

WALTER SHELTON,
For Defendant in Error.